A TREATISE ON RIGHT AND DUTY.

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A TREATISE

ON

RIGHT AND DUTY

THEIR EVOLUTION, DEFINITION, ANALYSIS AND CLASSIFICATION

ACCORDING TO

THE PRINCIPLES OF JURISPRUDENCE

BEING A PORTION

OF THE

MUHAMMADAN LAW OF GIFTS

BY

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PREFACE.

THE following pages originally formed a portion of my MUHAMMADAN LAW OF GIFT according to the Hanafi and Imamia Schools. As the contents of these pages relate to "What may be the subject matter of Gift" and discuss the Evolution, Definition, Analysis and Classification of *Right* and *Duty* they were appreciated by some of my friends who take an interest in the study of modern jurisprudence. It is at their request that the said portion has been published in the form of a separate treatise.

I am deeply indebted to Syed Mahmud of Lincoln's Inn, Esquire, Barrister-at-Law, late Judge of the High Court of Judicature for the North-Western Provinces, India, and late President of the Faculty of Law of the University of Allahabad, and to Pandit Jwaladat Joshi, Vakil of the High Court, for the most valuable assistance so very kindly given by them in writing these pages.

SYED KARAMAT HUSEIN.

ALLAHABAD:

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WHAT CAN BE THE SUBJECT MATTER OF GIFT

UNDER

THE HANAFI SCHOOL OF MUHAMMADAN LAW?

CHAPTER I.

TRANSFORMATION OF FORCE AND ITS APPLICATION TO VOLUNTARY ACTS.

1. THIS is a very important topic. As it is a maxim of law that *non dat qui non habet* (one can not give what one has not) a clear idea of what can be the subject matter of gift necessarily depends upon a clear idea of what can be the object of ownership. The conception of ownership, again in its turn, involves the conception of right. Thus we are naturally led to discuss the following questions, *viz*:—

i.—What is Right?

ii.—What are its component elements?

iii.—What are its different kinds?

2. Before attempting to answer these questions we have to tax the patience of our readers with a brief account of:—

i.—The indestructibility of Energy,

ii.—The law of Transformation and Equivalence of Force, and

iii.—The nature and conditions of life.

The reason of giving a brief account of the preceding subjects is that, from the point of view we have taken, the definition of *Right* is based upon such account.

3. The widest truth transcending demonstration is the Persistence of Force, and a derivative truth flowing from it is that Energy like Matter is indestructible, and on the truth of this proposition the possibility of exact Science depends. If Energy proceeded from nothing or lapsed into nothing, no right interpretation of the phenomena involving the manifestation of Energy would be possible; and if, instead of dealing with constant quantities of Energy, we had to deal with quantities which were apt to be annihilated, an incalculable element fatal to all positive conclusions would, as has been set forth by Herbert Spencer, be introduced. Induction has also verified that all cases of apparent ending of Energy into nothing are instances of transformation only.

4. Experiments prove that motion when arrested assumes under different circumstances the form of heat, light, electricity or magnetism. Heat is transformed into motion in a steam engine, and its transformation into electricity takes place when dissimilar metals touching each other are heated at the point of contact. A current of electricity generates magnetism in a bar of soft iron and the rotation of a permanent magnet gene-

rates currents of electricity. Magnetism produces motion. Chemical combinations produce heat and light. In short, Energy never ends in nothing: it always undergoes metamorphosis. When transformation of Energy takes place the new form is equal to the old one.*

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*"25. Energy.—There is another real thing which does not appeal so directly to our senses as matter does; fifty years ago it was unknown and a long course of reasoning was necessary to convince investigators of its existence and reality. Nothing appears more readily produced or destroyed than motion, heat, or light. Motion is destroyed in a railway train by applying the brake, in a bullet by contact with the target. Heat can be destroyed by using it up in a steam engine; the visible motion of an engine can be destroyed in turning a dynamo-electric machine; electric currents can be destroyed in an incandescent lamp; light can be destroyed by allowing it to fall on a black surface. Hence none of these things is real in itself. But when motion is stopped in a train heat is invariably produced, the wheels sometimes becoming red-hot. When heat is destroyed in a steam-engine visible motion is produced; when motion is destroyed in a dynamo-electric machine, electricity is produced; when electricity is destroyed in a lamp, light is produced; and when light is destroyed by falling on a black surface, heat is produced. More than this, the amount of heat, motion, electricity, light produced is the precise equivalent of what is destroyed in producing it. All are capable of doing work of some kind, and this power of doing work can neither be created nor destroyed, its amonnt can neither be increased nor diminished. ENERGY is the name given to this real thing."—*The Realm of Nature by H. R. Mill, Chap.* II, *p*, 15.

* "§ 73. Definition of Energy.—The energy of a body is its power of doing work. Every moving body possesses energy, *i.e.* it is capable of overcoming

5. The Transformation and Equivalence of Force is not confined to the physical forces of nature. The vital forces, both

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resistance. Instances of bodies possessing engery are numberless. The flying bullet has the power of piercing a sheet of iron and overcoming the cohesion between its particles; the running stream is able to turn the wheel of the water-mill, and the energy it possesses is utilized in grinding corn; the moving air drives the ship through the water and overcomes the resistance offered to its passage. Wherever we find matter in motion, be it solid, liquid, or gaseous, we have a certain amount of energy which can be utilized in endless ways.

"§ 74. Kinetic and Potential Energy.--The energy of moving matter is called Kinetic Energy: it is energy ready for use,—energy that is constantly being spent, though it may not be economically employed. The rivulet will flow from the highlands to the low lands, whether we give it work to do or not. Now, the energy of a moving body can be conveniently expressed in terms of its rate of motion. Suppose v to be the velocity of the moving mass and W its weight, and suppose s to be the vertical height to which W would rise if projected upwards with the velocity v, then W s is the measure of the work which W is capable of doing; and since $v^2=2\,g\,s$,

$$Ws=\frac{Wv^2}{2g}=\frac{M\,v^2}{2}$$

"Hence, the kinetic energy of a mass M moving with a velocity v is equal to $\frac{M\,v^2}{2}$, and this expression represents the number of units of work stored up in the moving body and available for any purpose to which the hand of man can adapt it.

"But matter is not deprived of energy even when at rest. We have seen that bodies at rest have a tendency to motion, which the removal of a force, or the application of a force, can always render actual. In the same way there exists in so-called inert matter,—in matter that is apparently at rest, a tendency to put forth energy, and this energy is called *Potential Energy*.

vegetal and animal, are also governed by the same law. The existing vital forces are the result of the previously existing forces,

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Suppose a weight of 1 lb. be projected vertically upwards with a velocity of 32·2 ft. per second. The energy imparted to the body will have carried it to a height of 16·1 ft, and the body will then cease to have any velocity. The whole of its kinetic energy will have been expended; but the body will have acquired, instead, a new position, a vantage ground; and if free to fall from this position it will obtain a velocity of 32·2 ft. per second, and thus re-acquire the energy which it originally received. Now, we may suppose the weight to be lodged for any length of time at an elevation of 16·1 ft. from its point of projection, and during this time its energy will be *latent* or *potential*—stored up and ready to be freed, whenever it shall be permitted to fall. It is evident that the matter of which this earth is composed is always endeavouring to find a lower level than it possesses; and this tendency is the source of its potential energy. The energy, which in bygone years has been expended in raising walls and towers on the tops of hills and elsewhere, still survives, and when the stones of which they are composed shall fall from their places, there will be expended in the fall the same amount of energy as was employed in raising them. In the boulder embedded in the sea-shore we have evidence of kinetic energy that has been spent; in the overhanging crag we see a mass endowed with the energy of position, which at any moment may be changed into an active and destructive force. Nature, by her own processes, is continually modifying the relative position of the matter of which this earth is formed, and in every change there is a re-adjustment of energy, but neither loss nor gain."—*Elementary Mechanics by Magnus, p.* 110, *11th Edition.*

"§ 78. Conservation of Energy.—The foregoing are a few instances of a vast number of facts, which have been generalised of late years into a fundamental law of physical science. This law, known as that of the Conservation of Energy, embraces the following propositions:—

(1) The sum total of energy in the universe remains the same.

and are equal to them, and when those vital forces are spent they are not lost; but only assume some other form. "Changes and

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(2) The various forms of energy may be converted the one into the other.

(3) No energy is ever lost."

"§ 79. (1) These three propositions are intimately connected with one another. To understand the first of them, we must suppose the universe to have been originally endowed with certain energies, the sum total of which is always, in quantity, the same. We have seen that various kinds of forces exist. The most important of these is Gravitation, with which matter in all its forms is universally endowed. It acts between bodies in mass and between the molecules of bodies. Other mechanical forces are Cohesion, which holds the particles of a body together, and Elasticity, which is exhibited in a watch-spring, and which causes the particles of a body to resume their original position after having undergone displacement. We have spoken of heat as a force, and have shown the relation between mechanical and thermal energy. The remaining forces of nature are less capable of being brought within the range of mechanical principles. These comprise Chemical affinity, which unites the elements that constitute a molecule or particle, Light, Electricity, and Magnetism. With respect to these forces, we can do no more than indicate the names by which they are known. What the law of conservation asserts is, that the sum total of energy due to all these forces always has remained and always will remain the same. If the energy due to any one force be diminished in quantity there must be a corresponding increase in some other variety of energy. It will be seen that this law of the totality of physical energy necessarily involves the second of the three propositions above stated."

"§ 80. (2) Transmutation of Energy.—Facts have already been mentioned that illustrate this law. The most general form of energy is what has been called 'visible energy,' *i. e.*, matter in motion. This can easily be converted into latent energy or energy of position. These two states are exemplified

the accompanying transformation of forces" says Spencer " are everywhere in progress from the movement of stars to the

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in the oscillation of a pendulum. When the pendulum reaches its lowest point it possesses a certain amount of kinetic energy, which is sufficient to raise it through a certain arc on the other side, and when it reaches its highest point it acquires an equivalent amount of latent energy, which being set free, is reconverted into energy of motion. This transmutation of kinetic into latent energy, and of latent into kinetic energy, might go on for ever, if the friction of the pivot and the resistance of the air did not gradually retard the motion of the pendulum. A certain amount of energy thus disappears, and we have found that the energy of motion that is lost is really converted into heat. The pivot and the air become heated by the motion. Kinetic energy, though it may endure for any limited period of time, must ultimately waste away into heat; and all moving bodies, in so far as they move against friction or through a resisting medium, will eventually come to rest. Perpetual motion, in the sense in which it is generally understood, is thus demonstrated to be impossible. Since, however, heat is shown to be a form of motion, it would appear that the motion of masses is perpetually changing into the motion of molecules.

"The connection between heat and motion is better understood than the relation between other forms of energy; but the researches of modern science are continually showing us how other varieties of energy are capable of being transmuted and reproduced under new forms. The exact nature of the various kinds of molecular energy, such as heat, light, electricity, magnetism, and chemical affinity, is not at present known, but we run little risk of error in affirming that they all consist either of peculiar kinds of molecular motions, or of peculiar arrangements of molecules as regards relative position. They must, therefore, fall under one or other of the two heads, 'Energy of Position' and 'Energy of Motion."

current of our thoughts." After stating the instances of correlation of vital forces the same author says:—

"Various classes of facts thus unite to prove that the law of metamorphosis, which holds among the physical forces, holds equally between them and the mental forces. Those modes of the Uuknowable which we call motion, heat, light, chemical affinity, &c., are alike transformable into each other, and into those modes of the Unknowable which we distinguish as sensation, emotion, thought; these, in their turns, being directly or indirectly retransformable into the original shapes. That no idea or feeling arises, save as a result of some physical force expended in producing it, is fast becoming a common place of science; and whoever duly weighs the evidence will

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"§ 81. (3) The Indestructibility of Energy.—Our law asserts that energy is never lost. It may become latent and remain so for centuries; but it is permanent. The great source of energy in this universe is the sun. Streams of energy are continually flowing from the sun to the earth, and this energy is made to do all kinds of useful work. It gives to the waters of our seas an energy of position, by converting them into vapour and raising them to the hill-tops. It supplies the vegetable world with the power of absorbing carbon from the air, and the carbon thus fixed in the plant is gradually converted into wood, which may be immediately employed as fuel, or may reappear as coal after having been buried in the earth for thousands of years. In either case the sun's energy, stored up in the fuel, is eventually set free to be converted into work. The vegetable products of the earth supply food to animals, and these again supply food to man; and thus the energy of animal agents is ultimately derivable from the sun. Our scientific knowledge may be too limited to enable us, in all cases, to trace the course of energy through its various transmutations; but every new observation that is made brings with it additional evidence tending to verify the law that energy is never lost."—*Mechanics by Magnus pp.* 118-122, *11th edition.*

see, that nothing but an overwhelming bias in favour of a pre-conceived theory, can explain its non-acceptance. How this metamorphosis takes place how a force existing as motion, heat, or light, can become a mode of consciousness—how it is possible for aerial vibrations to generate the sensation we call sound, or for the forces liberated by chemical changes in the brain to give rise to emotion—these are mysteries which it is impossible to fathom. But they are not profounder mysteries than the transformations of the physical forces into each other. They are not more completely beyond our comprehension than the natures of mind and matter. They have simply the same insolubility as all other ultimate questions. We can learn nothing more than that there is one of the uniformities in the order of phenomena."—*Herbert Spencer's First Principles, p.* 217.

6. An ordinary illustration of the Transformation of Energy takes place when a smith works ten hours to make a spade. The spade represents a definite quantity of the energy of the smith spent in making it; and may reproduce exactly ten hours work of the smith. Jevons in his Theory of Political Economy, in dealing with Capital says "This spade represents so much labour which has been invested and so far spent; but if it lasts three years its cost may be considered as repaid during these three years."*

Similarly, if a servant performs a particular service, for a month, and receives thirty rupees, that sum, in the normal state of things, is so much of the energy of the servant consolidated in the shape of money.

* Jevons' Theory of Political Economy, p. 245, 2nd edition.

Bearing in mind what has been stated about the Transformation and Equivalence of Force, the following propositions may safely be laid down :—

i.—Our voluntary acts are manifestations of energy.

ii.—The energy spent in voluntary acts is not lost but simply transformed into the results of labour.

iii—The results of labour are equal to the amount of energy spent in their production. In other words, there is a natural and approximate equivalence between the energy spent and the results produced.

The third proposition requires two limitations—

i.—The results of labour of an Individual do not exactly represent the whole amount of his energy spent in their production. Some portion of the Individual's energy thus spent may assume such shapes as form no partof those results in the eye of the law.

ii.—There may be consequences which, strictly speaking, are not the transmuted forms of the energy of a particular Individnal, and of that Individual's energy alone, but still moral and political considerations may recognize those consequences to be the results of the transformation of the energy of that Individual. Keeping in view the said two limitations the third proposition states what is true for all legal and moral purposes.

CHAPTER II.

LIFE AND ITS CONDITIONS.

7. Now as to life and its conditions. Spencer having defined life as "the definite combination of heterogeneous changes both simultaneous and successive in correspondence with external co-existences and sequences" says :—

"The presentation of the phenomena under this general form suggests how our definition of life may be reduced to its most abstract shape; and perhaps its best shape. By regarding the respective elements of the definition as relations, we avoid both the circumlocution and the verbal inaccuracy; and that we may so regard them with propriety is obvious. If a creature's rate of assimilation is increased in consequence of a decrease of temperature in the environment; it is that the relation between the food consumed and heat produced, is so re-adjusted by multiplying (both) its members, that the altered relation in the surrounding medium between the quantity of heat absorbed from, and radiated to, bodies of a given temperature, is counterbalanced. If a sound or a scent wafted to it on the breeze, prompts the stag to dart away from the deer stalker; it is that there exists in its neighbourhood a relation between a certain sensible property and certain actions dangerous to the stag, while in its organism there exists an adopted relation between the impression this sensible property produces, and the actions by which danger is escaped. If inquiry has led the chemist to a law, enabling him to tell how much of any one element will combine with so much of another, it is that there has been established in him specific mental relations which accord with specific chemical relations in the things around. Seeing, then, that in all cases we may consider the external phenomena as simply in relation, and the internal phenomena also as simply in relation; the broadest and most complete

definition of life will be—*the continuous adjustment of internal relations to external relations.**

"While it is simpler, this modified formula has the further advantage of being somewhat more comprehensive. To say that it includes not only those definite combinations of simultaneous and successive changes in an organism, which correspond to co-existences and sequences in the environment, but also those structural arrangements which *enable* the organism to adapt its actions to actions in the environment, may perhaps be going too far; for though these structural arrangements present internal relations adjusted to external relations, yet the *continuous adjustment* of relations can scarcely be held to include a *fixed adjustment* already made. Clearly, life, which is made up of *dynamical* phenomena, cannot be defined in terms that shall at the same time define the apparatus manifesting it, which presents only *statical* phenomena. But while this antithesis serves to remind us that the fundamental distinction between the organism and its actions, is as wide as that between matter and motion, it at the same time draws attention to the fact, that if the structural arrangements of the adult are not properly included in the definition, yet developmental processes by which those arrangements were established, are included. For that process of evolution during which the organs of the embryo are fitted to their prospective functions, is from beginning to end the gradual or continuous adjustment of internal relations to external relations. Moreover, those structural modifications of the adult organism, which under change of climate, change of occupation, change of food, slowly bring about some re-arrangement in the organic balance, must similarly be regarded as continuous adjustment of internal relations to external relations. So that not only does the definition, as thus expressed, comprehend all those activities, bodily and mental, which constitute our ordinary idea of Life; but it also comprehends, both those processes of development by which the organism

* For further elucidation of this general doctrine, see First Principles, section 25.

is brought into general fitness for these activities, and those after processes of adaptation by which it is specially fitted to its special activities.

"Nevertheless, superior as it is in simplicity and comprehensiveness, so abstract a formula as this is scarcely fitted for our present purpose. Reserving its terms for such use as occasion may dictate, it will be best commonly to employ its more concrete equivalent—to consider the internal relations as "definite combinations of simultaneous and successive changes;" the external relations as 'co-existences and sequences;' and the connexion between them as a 'correspondence.'"—*Principles of Biology, Vol. I, pp* 79-81.

8. Accepting, as correct, what we have quoted from Herbert Spencer regarding the conception of life, the most important proposition which is to be enunciated, first, is that the relation between 'adjustment' as a process and life as a product is not a fortuitous relation. On the contrary the connection between the two, (be it the expression of the Divine Will or the mode of working of the Unknowable Power in the Universe,) is a *necessary* one. For experience proves that any voluntary act or external event which terminates life does so, only, as has been stated, by disturbing the 'adjustment' between the internal and the external relations. And it follows naturally that *cease to adujst, cease to live* is one of the fundamental principles which govern the animate world.

9. Analytically considered the preservation of 'adjustment,' and as a consequence, the preservation of life, depends partly upon the Individual and partly upon his Environment. What depends upon the Individual is that he must *perform* the life sustaining

acts and functions, and must *abstain* from the life destroying actions. For he must exert himself to procure the necessities of life, and, when procured, must use them for the preservation thereof. If he omits to do so, or to do any other life sustaining act, he must die. Likewise, he must not take poison, or drown himself, or commit any other act which cuts his life short. Speaking, in general terms, he, in order to live, must put himself in favourable relations with the materials, and forces, which surround him, and must avoid such relations therewith as may prove fatal.

10. What depends upon the Environment is that none of its agencies should deprive the Individual of his life or any portion of his energy in any shape or form. Any thing which kills the Individual, stops him from working, or reduces his working capacity, disturbs 'adjustment' and life. The absence of such disturbance is as necessary for the preservation of life of the Individual as the presence of the life sustaining acts to be done by the Individual.

11. An indirect disturbance of adjustment, which injures life, deserves special notice. The Individual must not be deprived, by the agencies in the Environment, of the beneficial results of his labour, inasmuch as those results under the law of Transformation and Equivalence of Force approximately represent a

definite quantity of the energy of the Individual, and if he is deprived of such results, he is, indeed, deprived of the definite quantity of his energy represented by those results.

12. If a hunter, after ten hours' hard labour, succeeds in obtaining certain game, which, in the form of food, would be enough to sustain his life for four days, and some external agency deprives him of the game, the result is: that a definite quantity of the energy, enough to keep him alive for four days, has been taken away from him. If the same thing happens continuously, for four or five days, the energy of the hunter, if he has no other food to live upon, is exhausted and death ensues. The proposition above enunciated that the loss of the results of labour means the loss of a definite quantity of energy, is a truth directly deducible from the law of the Transformation and Equivalence of Force. But in the complex relations of man with man, and of man with his Environment, the said truth is not always easily discernible. For, usually, it is impossible to calculate how much of the energy is lost when a particular result of that energy is lost.

For instance if letters written by one Individual are destroyed by another, it is not easy, in the first place, to declare, with certainty, that each of those letters, as a product of labour, was beneficial to the writer, and, in the next place, it

is impossible to determine how much each of those letters is equal to how much of the energy spent in writing it. Such complexities may, no doubt, obscure the connection between the loss of the results and of life, they, however, cannot alter such connection.

13. The question as to the injurious results of the exercise of the limited energy and of interference therewith may, for the present, be left alone. Because, if any external agency deprives the worker of the injurious results of his labour, no doubt, a definite quantity of his energy is pilfered; but such pilfering saves him from the hurtful effects of those results. For instance when an Individual, after five hours' hard labour, collects one pound of poisonous berries which, he imagines, would suffice as his food, for the day, and by some chance he is deprived of them, he suffers loss of a definite quantity of energy. But his life is saved by the loss of the berries, for if he had eaten them he would have died.

14. It follows from what has been stated above that the conditions upon which the continuation of the life of an adult in a definite Physical Environment depends are bifurcated into:—

i.—Positive.

ii.—Negative.

The Positive component is that the *Individual is performing the life sustaining acts.* The Negative component is that *no agency in the Environment is interfering with his life.* The Positive component is in the power of the Individual and the Negative component is in the power of others.

The general proposition that life depends upon the above-stated conditions may be termed the *formula of life.*

15. The word Environment has been used in the preceding sections and what we mean by it, is :—

The aggregate of Matters, Forces and Combinations thereof which surround *living organisms* and affect them.

Environment may be divided into :—

i.—Physical Environment.

ii.—Social Environment.

iii.—Physico-Social Environment.

Physical Environment means such an aggregate of Matters, Forces and Combinations thereof as are found in Nature without the agency of Man.

Social Environment means such an aggregate of Matters, Forces and Combinations thereof as result from the agency of Man.

Physico-social Environment means a complex combination of Physical and Social Environments.

16. When the aforesaid conditions are satisfied life is preserved, whatever its duration or grade may be. The quality and quantity, namely, the grade and duration of life in Individuals, however, vary, and the variation is due to the variation in the Energy stored up in the Individual and in his Environment. The Environment, in the first place, regulates the number and the quality of the life sustaining acts which are to be performed to preserve the 'adjustment.'

For example an Individual who lives in a simple and comparatively homogeneous Environment has to do a few simple acts to keep himself alive. So that, where food is to be had by gathering wild berries, the life sustaining acts, so far as the supply of food is concerned, are very few and simple as compared with the life sustaining acts of a farmer who has to grow corn for the supply of his food. In the same way where climate is practically unchangeable the acts done for the preservation of life in such a climate are simpler and fewer in comparison with the acts required of an Individual placed in a changeable climate.

As a general proposition of the complexity of the life sustaining acts is in direct proportion to the complexity of the Environment. To see this truth very clearly one has only to compare the simplicity of the life sustaining acts of a savage, in the desert of Africa with

the complexity of the analogous acts done by a wealthy merchant in the United States of America.

17. The quality and quantity of life, namely, its grade and duration depend upon the characters of the Energy and of the Environment of the Individual concerned. Other things being equal, a superior energy favours a superior life. In the same way, a superior Environment favours a superior life.

The mere superiority of either the Energy or the Environment, however, is not sufficient to affect the area of life; for much depends upon the exertion of the Individual. An Individual of an inferior energy, placed in an inferior Environment, may live, through hard work, a life superior to the life of another Individual who has superior energy and is placed in a superior Environment, but does not work.

Regarding the expression 'the area of life' we may say that the duration of a life is considered as its length and the usefulness of that life is considered as its breadth, and the product of the two dimensions is regarded to be the area of that life.

CHAPTER III.

EVOLUTION AND DEFINITION OF RIGHT AND DUTY.

18. So far we have been contemplating an Individual who lives in a Physical Environment, without being in Co-operation

with others. What we attempt, now, is to discuss the question of the preservation of life with reference to a multitude of Individuals each of whom lives in the presence of others, and has to co-operate with them for mutual benefit.

When Individuals find Co-operation to be favourable* for the maintenance of life, they begin to live together in groups which, in the course of time, by the process of Evolution,

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* §. 14. More clearly in the human race than in lower races, we are shown that gregariousness establishes itself because it profits the variety in which it arises; partly by furthering general safety and partly by facilitating sustentation. And we are shown that the degree of gregariousness is determined by the degree in which it thus subserves the interests of the society. For where the society is one of which the members live on wild food, they associate only in small groups; game and fruits widely distributed, can support these only. But greater gregariousness arises where agriculture makes possible the support of a large number on a small area; and where the accompanying development of industries introduces many and various co-operations.

"We come now to the truth—faintly indicated among lower beings and conspicuously displayed among human beings—that the advantages of co-operation can be had only by conformity to certain requirements which association imposes. The mutual hindrances liable to arise during the pursuit of their ends by individuals living in proximity must be kept within such limits as to leave a surplus of advantage obtained by associated life. Some types of men, as the Abors, lead solitary lives, because their aggressiveness is such that they cannot live together. And this extreme case makes it clear that though, in many primitive groups, individual antagonisms often cause quarrels, yet the groups are maintained because their members derive a balance of benefit chiefly in greater safety. It is also clear that in proportion as communities

assume the form of Nations. And in consequence of such Co-operation the social Environment is added to the Physical Environment, and instead of only one life being maintained in a definite Physical Environment a multitude of lives has to be simultaneously maintained in a definite Physico-social Environment.

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become developed, their division of labour becomes complex and their transactions multiplied, the advantages of co-operation can be gained only by a still better maintenance of those limits to each man's activities necessitated by the simultaneous actions of others. This is illustrated by the unprosperous or decaying state of communities in which the trespasses of individuals on one another are so numerous and great as generally to prevent them from severally receiving the normal results of their labours.

"The requirement that individual actions must be mutually restrained which we saw is so felt among certain inferior gregarious creatures that they inflict punishments on those who do not duly restrain them, is a requirement which, more imperative among men, and more distinctly felt by them to be a requirement, causes a still more marked habit of inflicting punishments on offenders. Though in primitive groups it is commonly left to any one who is injured to revenge himself on the injurer; and though even in the societies of feudal Europe, the defending and enforcing of his claims was in many cases held to be each man's personal concern; yet there has ever tended to grow up such perception of the need for internal order, and such sentiment accompanying the perception, that infliction of punishments by the community as a whole, or by its established agents, has become habitual. And that a system of laws enacting restrictions on conduct, and punishments for breaking them, is a natural product of human life carried on under social conditions, is shown by the fact that in numerous nations composed of various types of mankind, similar actions, similarly regarded as trespasses, have been similarly forbidden."

19. The appearance of the Social Factor upon the scene in the Environment, through Co-operation, calls for further 'adjustment' between the internal and the external relations of Co-existences and Sequences. Revolutionary changes are brought about in both the Positive and Negative constituents of the formula of life. And a foundation is laid for the Evolution of the idea of Justice, of Rights and Duties, whether Natural, or Moral or Legal. Moreover it will be observed, that a necessity, simultaneously with the Evolution of the ideas of Justice, of Rights and Duties, is felt for fixing such lines of conduct for Individuals as are deemed indispensable for the continuity of the 'adjustment' essential for the preservation of the lives of such Individuals, not only when those Individuals are placed in multifarious relations with one another; but also when they are in such relations with the State.

By the term State we mean an organized assemblage of Individuals in Co-operation, for their physical, moral and mental

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"Through all these sets of facts is manifested the truth, recognized practically if not theoretically, that each individual carrying on the actions which subserve his life, and not prevented from receiving their normal results, good and bad, shall carry on these actions under such restrictions as are imposed by the carrying on of kindred actions by other individuals, who have similarly to receive such normal results, good and bad. And vaguely, if not definitely, this is seen to constitute what is called justice.—*Justice by Herbert Spencer, sec.* 14, *pp.* 19-21.

welfare. in which assemblage one or more than one is the Regulative authority.

20. When an Individual is alone in a definite Physical Environment his freedom to act is unlimited, by any such restrictions as the Social Factor would impose. Such freedom affects the area of *his life only*, and does not affect any one else; simply because there is no one else to be so affected.

When, however, there is a multitude of similarly constituted and co-operating Individuals the unlimited freedom of each is so restrained as to favour and promote the individual and the collective life, in the greatest possible measure. The restraint to be imposed is that *every Individual is to perform his life sustaining acts so as not to interfere with the life sustaining acts of other Individuals.* Such a restriction allots a definite sphere of action to each Individual, beyond which he should not go. Subject to the above restriction, all co-operating Individuals are, on the one hand, equally, free to perform the life sustaining acts, as they please, in their definite spheres of action ; and on the other hand, all of them are, equally, bound to abstain from trespassing upon the definite spheres of action of others.

21. A concrete example will make our meaning clear. Suppose that there is an island measuring 100 square miles which

is allotted to 100 Individuals, a square mile to each. Suppose also that complete liberty is given to each of them to deal with his square mile, as he pleases, and that each of them is strictly prohibited from trespassing upon the rest of the square miles allotted to others. Now if we suppose the square mile represents the limited freedom of each Individual as above described, the result will be as follows. Every Individual will be completely free within the limited area of freedom allotted to him to act as he pleases, and will be strictly bound to *abstain* from trespassing upon the areas of freedom belonging to others.

The above stated assignment of equal areas of freedom to Individuals entitling each to act as he pleases, for the maintenance of his life coupled with the imposition of equal degrees of abstinence from interfering with the limited freedom of others, constitutes *Justice* between man and man. Herbert Spencer, whose doctrines are the basis of what we have stated, has set forth the *formula of Justice* in the following words :—

"The formula has to unite a positive element with a negative element. It must be positive in so far as it asserts for each that, since he is to receive and suffer the good and evil results of his actions, he must be allowed to act, and it must be negative in so far as, by asserting this of every one, it implies that each can be allowed to act only under the restraint imposed by the presence of others having like claims to act. Evidently the positive element is that which expresses a pre-requisite to life in general, and the negative

element is that which qualifies this pre-requisite in the way required when, instead of one life carried on alone, there are many lives carried on together.

Hence that which we have to express in a precise way, is the liberty of each limited only by the like liberties of all. This we do by saying :—Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."—*Justice p.* 45.

22. That Co-operation makes the limitation of the complete freedom of action indispensable, is well illustrated by the limitation of the functions which are to be performed by the various organs which constitute an organism. Each of such organs has to perform a definite function, and has to so perform it, as not to interfere with other organs, in the performance of their functions. If there were an organism which were subject to any such system of law as would recognise Rights and Duties, the right of every organ would be to have the limited freedom to perform *its* function fully, and its duty would be to *abstain* from interference with other organs in the performance of *their* functions.

Herbert Spencer states the analogy between the State and the organism in the following terms :—

"Fully to appreciate the import of this law, we may with advantage pause a moment to contemplate an analogous law ; or rather, the same law as exhibited in another sphere. Besides being displayed in the relations among members of a species, as respectively well sustained or ill sustained according to their well adopted activities or ill adapted activities, it is displayed in the relations of the parts of each organism to one another.

"Every muscle, every viscus, every gland, receives blood in proportion to function. If it does little it is ill-fed and dwindles, if it does much it is well-fed and grows. By this balancing of expenditure and nutrition, there is, at the same time, a balancing of the relative powers of the parts of the organism; so that the organism as a whole is fitted to its existence by having its parts continuously proportioned to the requirements. And clearly this principle of self-adjustment within each individual, is paralleled to that principle of self-adjustment by which the species as a whole keeps itself fitted to its environment. For by the better nutrition and greater power of propagation which come to members of the species that have faculties and consequent activities best adapted to the needs, joined with the lower sustentation of self and offspring which accompany less adapted faculties and activities, there is caused such special growth of the species as most conduces to its survival in face of surrounding conditions."—*Justice p.* 8.

23. From what we have already stated it is clear that the essential conditions of existence in a definite *Physico-social Environment*, so far as the relations of the co-operating Individuals, are concerned are :—

(1) Equality of all the Individuals forming members of a Nation to act as they please, within their limited freedom.

(2) Equality of Injunction to every one of them to *abstain* from trespassing upon the limited freedom of others.

24. In the absence of the two equalities stated in the preceding section the life of the Nation as well as of its individual members becomes annihilated. In some cases, the annihilation is instantaneous and in others, gradual. If the disturbance of

balance between the two Equalities is great, the annihilation is instantaneous, and if the disturbance is slight, the annihilation is gradual.

A Nation in this respect is like an organism which cannot live if the limited freedom of the various organs is not maintained. The analogy has already been cited (S. 22) from Herbert Spencer. The above mentioned two Equalities, *viz.*, the Equality of freedom of each Individual to act as he pleases within his limited sphere and the Equality of restraint imposed on each Individual from going beyond such sphere—which Equalities are the constituent elements of the formula of Justice—have for their result the keeping of the Natural Equilibrium between the exercise of the limited energy of each Individual and the results of its exercise. We may therefore say that the approximate Equilibrium between the exercise of the limited energy and the results thereof is *absolutely necessary* for the maintenance of life in a definite Physico-social Environment; and that any disturbance of the Equilibrium puts an end to life, instantaneously or gradually.

25. The results of the exercise of the limited freedom of the Individuals may be either beneficial or baneful, and the Equilibrium between the energy and the results may be disturbed by withholding from an Individual either the beneficial or the baneful results of his acts. The injurious consequences of withholding

the beneficial results have already been stated (S. 12); and it remains to show that the withholding of the baneful results of an Individual's acts in a definite Physico-social Environment is as prejudicial to Life as the withholding of the beneficial results.

There may no doubt be rare cases of interference with the baneful results of the labour of an Individual which (beyond the waste of the definite quantity of energy spent in procuring them, and the waste of the energy of the interferer spent in destroying them), cause no other injury. In the majority of cases of daily occurrence, however, an interference with the baneful results of the energy of one Individual means to punish the innocent for the crimes of the guilty, and thus to injure the life of the former.

For example, if B after 3 hours' hard labour, collects a quantity of poisonous mushrooms, and C snatches them from him and buries them in the earth, the definite quantity of energy of B which was spent in collecting the mushrooms, is wasted by the interference of C, and a definite quantity of C's energy spent in burying them is also wasted, if we put aside the fact that the act done by C was not meant to injure B, but to save his life. Such cases, however, are of rare occurrence. What is daily brought to our notice is, that an Individual, owing to his ill-adjusted acts and inapt habits is unable to

support himself, and that some other Individual is obliged to give away a portion of the beneficial results of his own labour, in order to enable the inapt Individual to keep himself alive.

Such an interference with the baneful results of the voluntary acts of an Individual is detrimental to life, both of himself and other co-operating Individuals, in a definite Physico-social Environment in two ways :—

(1) It takes away from a fit worker a part of the beneficial results of his energy without any recompense, and thus deprives him of a definite quantity of his energy.

(2) It encourages the propagation and multiplication of the unfit, by providing them with a gratuitous support.

The above two factors put together are the precursors of the fall and disintegration of Nations.

CHAPTER IV.

RIGHTS AS COROLLARIES OF THE FORMULA OF LIFE.

26. WHAT has been set out in sections 18, et seq., shows that the maintenance of life, both individual and collective in a Physico-social Environment depends upon the approximate Equilibrium between the amount of the energy of each Individual and its results, and that such Equilibrium depends upon the two Equalities mentioned in S. 23. Such being the case, I take

the opportunity to enunciate that the dependence of the Life upon the Equilibrium is not a fortuitous coincidence. Such dependence is one of the Laws of Nature which operates with persistent uniformity, and which may be expressed by saying that the connection between the Life and the Equilibrium is a *necessary connection.*

This Law of Dependence of the Life upon the Equilibrium is one of the fundamental truths of Biology, and that biological truth is at the bottom of all Rights and Duties and is the real foundation of the Ethical truth consisting of the following propositions:—

i.—*If life in a Physico-social Environment is a desideratum every co-operating Individual must have a perfect freedom to act as he pleases within his Limited Freedom.*

ii.—*Each co-operating Individual should abstain from trespassing upon the Limited Freedom of others.*

The position of each Individual in a Physico-social Environment is, thus, a relative one. The *relation* which an Individual should have with his own Limited Freedom, for the preservation of his life, directly, and of the lives of others indirectly, in a Physico-social Environment is his *Right*; and the *relation* which he should have with the Limited Freedoms of others, for the preservation of their lives directly, and his life indirectly, is his *Duty*.

27. In the case of *Right*, the *relation* between an Individual and his Limited Freedom has reference to an *active phase* of human conduct. The *Subject* of *Right*, namely, the Individual entitled to the *Object* of *Right* has to utilize his Limited Freedom as he pleases, for the preservation of his life. In the case of *Duty* the *relation* is a *passive phase* of human conduct The *Person bound*, namely, the Individual upon whom the *Duty* is cast has to *abstain* from interfering with the Limited Freedoms* of others for the preservation of their lives.

28. According to the foregoing conception of *Right* various of its classes are only deductions from the *formula* of *Justice*.

Upon this point Herbert Spencer says:—

"Men's activities are many in their kinds and the consequent social relations are complex. Hence, that the general formula of justice may serve for guidance, deductions must be drawn severally applicable to special classes of cases. The statement, that the liberty of each individual is restricted only by the like liberties of all, remains a dead letter until it is shown what the restraints, which arise under the various sets of circumstances he is exposed to, are. Whoever admits that each man must have a certain restrictedf reedom asserts that it is right that he should have this restricted freedom. If it be shown to follow, now in this case and now in that, that he is free to act up to a certain limit, but not beyond it, then the implied admission is that it is right he should have the particular freedom so defined and hence the several freedoms deducible may fitly be called, as they commonly are called, his rights."—*Herbert Spencer on Justice, ch.* 8, *p* 62.

* We have taken the liberty to use 'Freedom' in a concrete sense.

29. Bearing in mind what has been said above, *Right*, for purposes of Jurisprudence, may be defined to be *a definite relation between an Individual and his Limited Freedom essential for the preservation of his life directly, and of the lives of others indirectly, in a Physico-social Environment.*

The most typical example of the definite *relation* called *Right* is the proprietary relation between an Individual and his property; and it may, safely, be said that the definition of *Right*, as we have stated, is the highest generalization of the *relation* of Ownership.

Duty is the correlative of *Right*, and may be defined to be *a definite relation between an Individual and the Limited Freedoms of others essential for the preservation of their lives directly, and of his life, indirectly, in a Physico-social Environment.*

The most typical example of *Duty* is the *Abstinence* which every Individual of a Nation is bound to show towards the proprietary relations of other Individuals of that Nation, with their respective properties, and it may safely be said that the conception of *Duty* is the highest generalization of various acts of *Abstinence* shown towards the *Object* of *Right* of others necessary for the maintenance of life both Individual and collective in a Physico-social Environment.

29-a. The various classes of *Rights* as corollaries from the *formula of justice* have been set forth by Herbert Spencer in the following order :—

The right to physical integrity.

The rights to free motion and locomotion.

The rights to the uses of natural media.

The right of property.

The right of incorporeal property.

The rights of gift and bequest.

The rights of free exchange and free contract.

The rights of free industry.

The rights of free belief and worship.

The rights of free speech and publication

The above is the list of all the *Rights* which an Individual should have, and it is his *Duty* to *Abstain* from infringing the similar *Rights* of others.

Each of the classes of *Right* set forth above has a corresponding *Duty* which need not be stated in detail.

29-b. The definition of *Right* as a *relation* between a Person (S. 51) and a Thing (S. 51) may startle those who have been made familiar with the current definition of *Right* as a *capacity* (S. 86). Later on (S. 87, et seq) we shall criticise the current definition of *Right*; but here we think it desirable to make a few observations to justify the definition we have ventured to devise.

If we were to divide the knowable objects of thought into :—

i. Things; and,

ii. Relations of things :

Right, as an object of thought, would decidedly, belong to the second class; because *Right* is not analogous to any *one* thing like a book, a field, a picture, an idea, or a conception, when the last two terms are deemed to be the *single* objects of thought.

Right, as belonging to the category of relation, is not a relation among objects more than two: It is a relation between two objects only. Being a *relation* between two objects only ; both of those two objects are neither *Persons* nor *Things*; because a relation between two *Persons* or between two *Things* cannot be deemed a *Right* in Jurisprudence.

In order to constitute a *Right* in the eye of the Law the relation must be a relation between a *Person* who is the *Subject* of *Right* (S. 52) and a *Thing* which is the *Object* of *Right* (S. 52).

Having so far stated that *Right*, from the stand point of Jurisprudence, is a *relation*, that it is a *relation* between two objects of thought only, and that one of those objects is a *Person* and the other is a *Thing*, we proceed to set forth the characteristics which differentiate *Right* from other relations in Jurisprudence.

The Juristic relation named *Right* must, in the first place be, a relation of control by the *Person* over the *Thing*.

Such relation of control must, in the second place, be for the enjoyment of the *Thing* by the *Persons*. The ultimate end of

the relation must be the preservation of life in a definite Environment.

29-c. Let us now show that the various classes of the so-called *rights* in *rem* and *rights* in *personam* (S. 54) are but instances of the Juristic relation of control which a *Person* has over a *Thing*, in order to enjoy such *Thing*, for the preservation of life in a definite Environment.

In the case of *rights in rem* (S. 54) the *Thing* forming the *Object* of *Right* is in the *possession* or *quasi possession* of the *Person* who is the *Subject* of *Right*. Hence that *Person* has a *relation* of control over that *Thing*.

In the case of *rights ex contractu* the Law indeed confers upon the promisee a *relation* of control with reference to such acts of the promisor as he undertakes to perform, in pursuance of the contract. There may exist a difference between the nature of the *acts*, over which there is a control in a *right in rem* and the nature of things other than *acts* over which there is a control in a *right ex contractu*. But the nature of the *control*, from the stand point of Jurisprudence, in both cases, is the same.

In the case of *rights ex delicto* the aggrieved party has a Juristic *relation* of control either with reference to the thing taken away from him, or with reference to the person or the

property of the wrong-doer, whereby the aggrieved party may indirectly at least have a *relation* of control over a *Thing* in order to enjoy it for the preservation of life, in an Environment.

CHAPTER V.

CLASSIFICATION OF RIGHTS.

30. THE classification quoted from Herbert Spencer has for its basis the *Object of Right.* There is, however, another classification in which the *source of Right* forms the basis. Any number of such *sources* may be thought of, and a classification made accordingly. We however confine ourselves, here, to the most important of such *sources.* The *source of Right* may be the *laws of life* based upon the *necessary connection* between our voluntary acts and life, both Individual and collective: it may be the *laws of Ethics,* or it may be the *laws of the State.*

When *Rights* are established with reference to the *laws of life* they are *Natural.* When they are established with reference to the *laws of Ethics* they are *Moral.* When they are established with reference to the *laws of the State* they are *Legal.*

A Natural Rights therefore, is a definite relation between an Individual and his Limited Freedom essential for the preservation of his life directly, and of the lives of others

indirectly in a Physico-social Environment, viewed from the stand-point of the laws of Life.

A Moral Right is a definite relation between an Individual and his Limited Freedom essential for the preservation of his life directly, and of the lives of others indirectly in a Physico-social Environment, viewed from the stand-point of the laws of Ethics.

A Legal Right is a definite relation between an Individual and his Limited Freedom essential for the preservation of his life directly and of the lives of others indirectly in a Physico-social Environment, viewed from the stand-point of the laws of the State.

Each of the three *Rights* above stated has a correlative *Duty*. Those duties are Natural, Moral and Legal.

A Natural Duty is a definite relation between an Individual and the Limited Freedom of others essential for the preservation of their lives directly and of his life indirectly, in a Physico-social Environment, established with reference to the laws of Life.

A Moral Duty is a definite relation between an Individual and the Limited Freedom of others essential for the preservation of their lives directly and of his life indirectly, in a Physico-social Environment, established with reference to the laws of Ethics.

A Legal Duty is a definite relation between an Individual and the Limited Freedom of others essential for the preservation of

their lives directly and of his life indirectly in a Physico-social Environment, established with reference to the laws of the State.

31. The only manner in which the Limited Freedom essential for the preservation of life, both individual and collective, in a Physico-social Environment, is to be marked out for each Individual, is to specify what he is to do and what he is not to do, when he is in a certain relation of Co-operation with others. In other words, definite lines of conduct are to be prescribed for him, in accordance with the general principle established for the framing of rules of conduct. That principle is as follows :—

A person through *organized* and *unorganized* experience learns that certain voluntary acts bring about certain results ; and, for the guidance of those who aim at such results, he suggests that if those results are to be gained, the voluntary acts which produce them should be done. The formula of the rules of conduct, therefore, is—*If you mean to obtain a definite result, you should follow a definite line of conduct, which line has been found to stand in the relation of cause to the result you seek.*

Bearing upon what we have just said, regarding the principle of the rules of conduct, are the following passages from Mill's Logic :—

"§ 1. In the preceding chapters we have endeavoured to characterise the present state of those among the branches of knowledge called Moral which

are sciences in the only proper sense of the term, that is, inquiries into the course of nature. It is customary, however, to include under the term Moral Knowledge, and even (though improperly) under that of Moral Science, an inquiry the results of which do not express themselves in the indicative, but in the imperative mood, or in periphrases equivalent to it; what is called the knowledge of duties, practical ethics, or morality.

" Now, the imperative mood is the characteristic of art, as distinguished from science. Whatever speaks in rules or precepts, not in assertions respecting matters of fact, is art; and ethics or morality is properly a portion of the art corresponding to the sciences of human nature and society.*

"The Method, therefore, of Ethics, can be no other than that of Art, or Practice, in general; and the portion yet incompleted of the task which we proposed to ourselves in the concluding Book is to characterise the general Method of Art, as distinguished from Science.

" § 2. In all branches of practical business, there are cases in which individuals are bound to conform their practice to a pre-established rule, while there are others in which it is part of their task to find or construct the rule by which they are to govern their conduct. The first, for example, is the case of a judge under a definite written code. The judge is not called upon to determine what course would be intrinsically the most advisable in the particular case in hand, but only within what rule of law it falls; what the legislature has ordained to be done in the kind of case, and must therefore be presumed to have intended in the individual case. The method must here be wholly and exclusively one of ratiocination or syllogism; and the process is obviously what in our analysis of the syllogism we showed that all ratiocination is namely, the interpretation of a formula.

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* It is almost superfluous to observe, that there is another meaning of the word art, in which it may be said to denote the poetical department or aspect of things in general, in contradistinction to the Scientific. In the text the word is used in its older, and, I hope, not yet obsolete sense.

"In order that our illustration of the opposite case may be taken from the same class of subjects as the former, we will suppose, in contrast with the situation of the judge, the position of the legislator. As the judge has laws for his guidance, so the legislator has rules and maxims of policy; but it would be a manifest error to suppose that the legislator is bound by these maxims in the same manner as the judge is bound by the laws, and that all he has to do is to argue down from them to the particular case, as the judge does from the laws. The legislator is bound to take into consideration the reasons or grounds of the maxim; the judge has nothing to do with those of the law, except so far as a consideration of them may throw light upon the intention of the law-maker, where his words have left it doubtful. To the judge, the rule, once positively ascertained, is final; but the legislator, or other practitioner, who goes by rules rather than by their reasons, like the old fashioned German tacticians who were vanquished by Napoleon, or the physician who preferred that his patients should die by rule rather than recover contrary to it, is rightly judged to be a mere pedant, and the slave of his formulas.

"Now, the reasons of a maxim of policy, or of any other rule of art, can be no other than the theorems of the corresponding science.

"The relation in which rules of art stand to doctrines of science may be thus characterised. The art proposes to itself an end to be attained, defines the end, and hands it over to the science. The science receives it, considers it as a phenomenon or effect to be studied, and having investigated its causes and conditions, sends it back to art with a theorem of the combination of circumstances by which it could be produced. Art then examines these combinations of circumstances, and according as any of them are or are not in human power, pronounces the end attainable or not. The only one of the premises, therefore, which art supplies is the original major premise, which asserts that the attainment of the given end is desirable. Science then lends to Art the proposition (obtained by a series of inductions or of deductions) that the performance of certain actions will attain the end. From these

premises Art concludes that the performance of these actions is desirable, and finding it also practicable, converts the theorem into a rule or precept."—*Mill's Logic, chap. XII, p.* 616. *People's edition,*

"§ 5. The grounds, then of every rule of art are to be found in theorems of science. An art, or a body of art, consists of the rules, together with as much of the speculative propositions as comprises the justification of those rules. The complete art of any matter includes a selection of such a portion from the science as is necessary to show on what conditions the effects which the art aims at producing depend. And art in general consists of the truths of science, arranged in the most convenient order for practice, instead of the order which is the most convenient for thought. Science groups and arranges its truths so as to enable us to take in at one view as much as possible of the general order of the universe. Art, though it must assume the same general laws follows them only into such of their detailed consequences as have led to the formation of rules of conduct, and brings together from parts of the field of science most remote from one another the truths relating to the production of the different and heterogeneous conditions necessary to each effect which the exigencies of practical life require to be produced.*"—*Mill's Logic, chap. XII, p.* 619, *People's edition.*

32. There are two points concerning the rules of conduct, in general, which have to be noticed here :—

Firstly, the rules, in the normal state of things, are based on the knowledge of the *connection* between certain voluntary acts and certain results thereof. Secondly, the mere formulation of any rule does not create any *connection* between the line

* Professor Bain and others call the selection from the truths of science made for the purposes of an art, a Practical Science ; and confine the name Art to the actual rules.

of conduct prescribed by such rule and the end, for the attainment of which that conduct is prescribed. For instance when a physician prescribes a drug, for a particular disease, he does not, by such prescription, invest the drug with the curative power he desires. What he actually does is that he simply states what he has known to exist objectively in Nature.

It follows, therefore, that the real test of the merits of all rules of conduct is to see if the acts specified are so connected with the ends, for which they are prescribed, as causes with their effects. If they are so connected, the rules are beneficial, and if they have no such connection, those rules are baneful.

33. Acting upon the general principle for the framing of rules of conduct, as above set forth (S. 31) a body of rules is required to be framed to define the Limited Freedom, essential for the preservation of life. both individual and collective, in a Physico-social Environment. And it is evident that if the framer of the rules possesses an accurate knowledge of the *connection* between the acts prescribed and the preservation of life, the rules will, no doubt, prove conducive to such preservation. On the other hand, when such rules have been framed without such knowledge and *connection* they will fail to preserve life.

It is, therefore, clear that the function of the framer of the rules of conduct, for the preservation of life, both individual

and collective in a Physico-social Environment, is not the *creation* of any new relation between the voluntary acts of Individuals and their lives. The framer of the rules simply states a relation which he has, by experience, found to exist in the objective world, between the voluntary acts and their results.

The above proposition holds good of a *legislator* who, properly speaking, is one of the *framers* of rules for the preservation of life in a Physico-social Environment, as much as it holds good of a physician who frames rules of hygiene. Austin, however, regarding the position of a State with reference to *Legal Rights* observes as follows :—

"Every legal right is the creature of a positive law : and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides. To every legal right there are therefore three parties :* The sovereign Government of one or a number which sets the positive law, and which through the positive law confers the legal right, and imposes the relative duty : the person or persons on whom the right is conferred : the person or persons on whom the duty is imposed, or to whom the positive law is set or directed. As I shall show hereafter the person or persons invested with the right, are not necessarily members of the independent political society wherein the author of the law is sovereign or supreme. The person or persons invested with the right may be a member or members, sovereign or subject, of another society political and

* It is hardly necessary for me to criticise the statement that there are three parties to every legal right.

independent. But (taking the proposition with the slight corrections which I shall state hereafter) the person or persons on whom the duty is imposed or to whom the law is set or directed are necessarily members of the independent political society wherein the author of the law is sovereign or supreme. For unless the party burthened with the duty were subject to the author of the law, the party would not be obnoxious to the legal or political sanction by which the duty and the right are respectively enforced and protected. A Government can hardly impose legal duties or obligations upon members of foreign societies: although it can invest them with legal rights, by imposing relative duties upon members of its own community. A party bearing a legal right, is not necessarily burthened with a legal trust. Consequently, a party may bear and exercise a legal right, though the party cannot be touched by the might or power of its author. But unless the opposite party or the party burthened with the relative duty, could be touched by the might of its author, the right and the relative duty with the law which confers and imposes them, were nearly nominal and illusory. And (taking the proposition with the slight corrections which I shall state hereafter) a person obnoxious to the sanction enforcing a positive law, is necessarily subject to the author of the law or is necessarily a member of the society wherein the author is sovereign."—*Austin, vol. I, p.* 290, *4th edition.*

"Strictly speaking, there are no rights but those which are the creatures of law, and I speak of any other kind of rights only in order that I may conform to the received language which certainly does allow us to speak of moral rights not sanctioned by law; thus, for example, we speak of rights created by treaty." *Austin, vol. I. p.* 354, *4th edition.*

"Every positive law, obtaining in any community, is a creature of the sovereign or state: having been established immediately by the monarch or supreme body, as exercising legislative or judicial functions: or having been established immediately by a subject, individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body had expressly or tacitly conferred."—*Austin, vol. II, p.* 550, *4th edition.*

Dr. Markby following Austin says :—

"Of course, as every right corresponds to a duty, and as every duty is created expressly or tacitly by the sovereign authority, so rights are created expressly or tacitly by the sovereign authority also. And as the term 'duty' implies that its observance is capable of being, and will be enforced by the power which creates it, so also the term 'right' implies protection from the same source."

34. Under a strong Government, no doubt, *Legal Rights*, from the stand-point of the Executive Government, are identical with the pleasure and caprice of the Sovereign Authority. No doubt, also, that, for the purposes of administering justice, State sanction is the ultimate source of the State-made Law; and only such Rights, as are recognised by the State, are deemed to be *Legal Rights*. It is on the above grounds that the judges, or the parties cannot question, or go behind such *Rights*. But looking from the stand-point of a scientific jurist the State does not *create Legal Rights* in the sense of making any line of conduct beneficial or baneful to life. What the State in making laws, really does, is that it only *recognises* the *necessary* connection between certain voluntary acts and life, both individual and collective, and expresses such connection in terms which accord with the knowledge and conviction of the legislator.

35. The *Limited Freedom* of the Individuals in various relations of Co-operation with one another is not only to be

defined ; but certain modes, for the protection of such *Freedom* are also to be fixed. The reason why such modes are to be fixed is that the most precisely defined *Freedom* would be useless *unless and until* there are proper means to protect such *Freedom.*

A cardinal point regarding the method, for the protection of the *Limited Freedom* of the Individuals, must not be lost sight of. The lines of *demarcation* of the various *Limited Freedoms*, which result from defining them, are the essential element of such *Freedoms*, and form part and parcel thereof; whilst the methods devised for the protection of such *Freedoms* are entirely extraneous to such *Freedoms* There may bevarious methods for the protection of a particular Freedom ; but those changing methods cannot be deemed to be essential elements of the Freedom for the protection of which those methods have been devised. The *Limited Freedom* of an Individual is the *Object of Right* of that Individual, and the questions—" How that *Object of Right* is to be protected from Infringement ?" "How, after such *Infringement*, the holder of the *Right* is to obtain redress ?"—are questions which do not form part and parcel of such *Object.* They relate to the *modus operandi* which the aggrieved holder of *Right* is to adopt for obtaining redress. Analogically speaking, those methods are as distinct from *Rights* as the remedies prescribed by a physician are from the health for the restoration of which they are suggested.

The *Limited Freedom* of an Individual is the highest conception of what he owns, for the preservation of life, both individual and collective; and the 'methods of protecting what is owned by an Individual,' can by no possible stretch of that expression be identified with what he owns.*

35-a. An important distinction between *Legal Rights* and *Rights* of other kinds has to be noticed here. If a *Legal Right* of an Individual, when in a particular relation of Co-operation with other Individuals, is compared with his *Moral* or *Natural Right*, in that relation, we find that sometimes those three *Rights* do and sometimes they do not coincide with one another. When they coincide they do so, because either the ultimate aim and end of all the three kinds of *Right* is the same, or the three distinct aims and ends may be obtained by the same line of conduct, on the part of the Individual placed in that particular relation. When the three kinds of *Right* conflict with one another, they do so, because, either the ultimate ends of those *Rights* differ from one another, or the framers of the rules of conduct, in defining those *Rights*, are not agreed as to the *connection* of the specified line of conduct with life, both individual and collective, although the ultimate end in view may be identical.

* There is a well-known principle of the Adjective Law that no one has a vested right in Procedure, and the distinction I have drawn between the legal right and the protection of it may be deemed to be the basis of that principle.

36. The position I take up is that the ultimate end of all the three kinds of Rights is the same; *viz* :—the preservation of life both individual and collective, in a Physico-social Environment; but such *Rights* either coincide or conflict with one another as the connection between the line of conduct prescribed by the framers of the rule in each case and the life, is clearly discernible or not Where the connection between the line of conduct to be followed and the life, is direct and certain, the three kinds of Rights coincide with one another; but where the connection is obscure and uncertain, they conflict with one another.

37. If, for example, an Individual is not allowed to exercise his *Limited Freedom* to eat the bread he has earned, his death is *inevitable*, and, as the connection of such a *Freedom* with his life is direct and certain, the *right* of freedom to eat one's own bread is a *Right* which is not only *Natural* but also *Moral* and *Legal*.

When the relation between a particular line of conduct and the life is indirect and complex, it becomes practically difficult, or impossible to measure the exact effect thereof upon life, both individual and collective. And such being the case a conflict between a *Natural* and a *Legal Right* ensues.

Take the example of Taxation for the support of the Poor. According to the principle of the approximate Equilibrium between

the exercise of the limited energy and the beneficial or baneful results thereof, no Individual in accordance with the principle of Justice, as we have enunciated it (S. 21), could be deprived of any portion of his earnings for the support of any other adult Individual. Hence the rule of Natural Law is that *no one should be taxed against his will for the support of any other adult Individual.* Wrong notions of charity, and ignorance of the immutable Law of the *Survival of the Fittest,* however, actuate many mistaken lovers of Humanity to confer a *Legal Right* upon unworthy Individuals to be supported and kept alive at the expense of worthy Individuals. The rule of the *Political Law* made by them is that '*certain worthy Individuals should pay certain taxes for the support of certain unworthy Individuals.* Such a conflict between *Natural Right* and *Legal Right* is due to the obscure and uncertain connection between Taxation and Life. If such legislators as follow in their action the feelings and sentiments of mistaken lovers of Humanity, could only see far enough, they would realize the serious consequence of such Taxation. And if they did so they would agree with the students of Biology and Sociology, and would consider such Taxation extremely objectionable. Such mistaken lovers of Humanity are simply impressed by the present and painful sight of improvidence on the part of the sufferers therefrom. Those mistaken lovers of Humanity being so impressed entirely

overlook the past and culpable improvidence which produced the present and painful sight. They likewise ignore the future and pernicious consequences of coming between improvidence and its results. It is in consequence of such an overlooking of the past and of ignoring the future, that the sympathies of such lovers of Humanity are moved by the painful sight, and they are made to provide for the improvident and unworthy, at the expense of the provident and the worthy.

38. If the position taken up by me is correct, and if the ultimate end of the *Natural* as well as of the *Moral* and the *Political Law* is the preservation of life, both individual, and collective, in a Physico-social Environment the result is that the *ultimate* end, at which each of the three systems aims, is identical and that those systems differ from one another *only* in respect of the *compass* of the voluntary acts regulated by each of the three systems.

From the point of view I have taken, the rules of the *Natural Law* will regulate all the voluntary acts of each co-operating Individual which affect life, both individual and collective. Such a system of *Natural Law* will, evidently constitute a *genus* in respect of the rules of conduct.

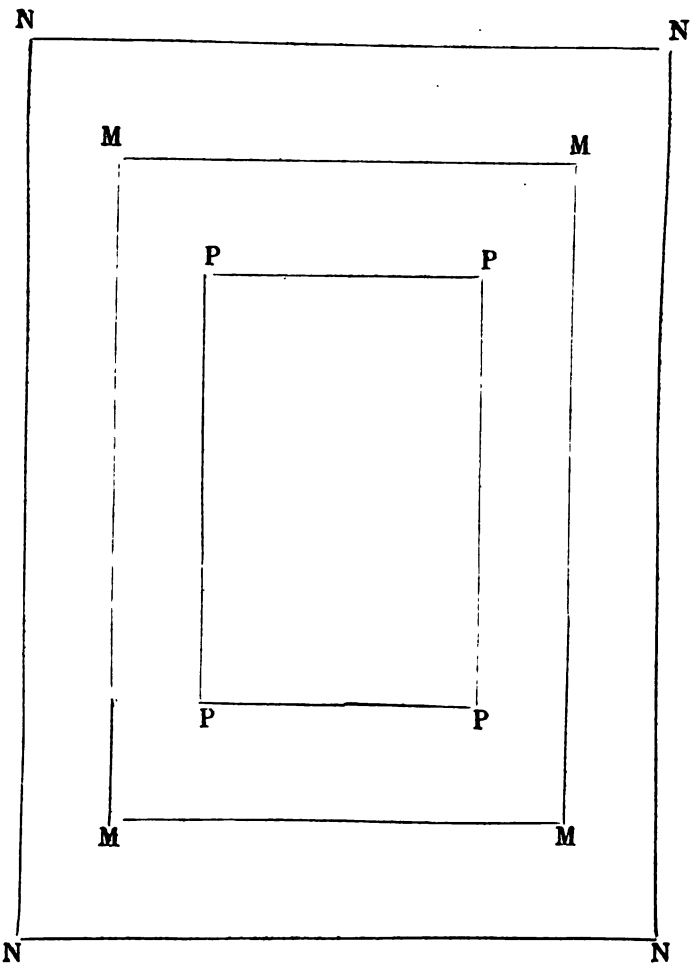
The rules of the *Moral Law* will be confined to such voluntary acts of each co-operating Individual as are done

in a *Social Environment* and affect life both individual and collective. Such a system being confined to a limited department of voluntary acts will, in comparison to the *Natural Law*, form a *species*.

The system of the *Political* Law will be confined to such voluntary acts as may trespass upon the freedom of Individuals other than the doer, and thus fall within the province of the *Negative Element* in the *formula of life*. Such a system of the *Polilical Law* will, therefore, form a *sub-species* of the *Moral Law*.

The compass of the *Negative* Element in the *formula of life* is the maximum extent of the field of voluntary acts which the system of the *Politicat Law*, may, in accordance, with the conception of Justice (S. 21) regulate. But in the existing systems of the *Political* Law the theoretical province of the *Political Law* has been disregarded. One often notices that the Political Legislators make Political rules for the relations which fall within the provinces of the *Moral Law* and even the *Natural Law*. The growing tendency of Modern Political Legislation, however, is not only to concern itself with its proper province, but also to select a number of co-operative relations of vital importance, and to make rules for those relations only.

The following diagram will, in a way, help the reader to form some idea of the relative *compasses* of the three systems :—



N, N, N, N.—The *compass* or the area of the *Natural Law.*

M, M, M, M.—The *compass* or the area of the *Moral Law.*

P, P, P, P.—The *compass* or the area of the *Political Law.*

CHAPTER VI.

ANALYSIS OF RIGHT.

39. RIGHT has already been defined to be a *relation*, and, understood as such, *Right* presupposes the presence of certain elements to stand related to each other. A careful analysis of *Right* shows that those elements are :—

(1) The *Person* who is to be benefited by the *relation*, for the maintenance of life, both individual and collective, in a Physico-social Environment.

(2) The *Thing* whereby the *Person* is to be benefited.

The *Person* who is to be benefited by the *relation*, is called the *Subject of Right*; and the *Thing* whereby the *Person* is to be benefited is called the *Object of Right*. The said two elements are the only elements yielded by the analysis of *Right*. No third element can be thought of, unless *Right* is made more complex by the addition of some fresh elements. *Right*, therefore, consists of :—

(1) The *Person* for whose benefit that *relation* exists, and who is entitled to enjoy the *Object* of *Right*.

(2) The *Limited Freedom* whereby the *Subject of Right* can be benefited for the preservation of life, both individual and collective, in a Physico-social Environment.

40. The expression *Subject of Right,* in order to cover all possible holders of Right, includes *Persons* both *Natural* and *Juristic.* For legal purposes a *corporation sole, a corporation aggregate,* or a *universitates bonorum* may be the *Subject* of *Right.*

In the case of a *Natural Person* the *Subject* of *Right* is *tangible.* In the case of a *Juristic Person* the *Subject* of *Right* is a concept, although ultimately there must be some Natural *Person* or *Persons* exercising the *Limited Freedom* or enjoying the results thereof. The reason of what we have thus stated is that the ultimate end of *Right* is the preservation of life; and an inanimate thing *i. e.*, a concept is incapable of being so benefited, for it has no life to be preserved. In Jurisprudence, however, we do not go so far; but have to invent a fiction whereby we invest *Juristic Persons* with *Rights* which in reality are not intended for the benefit of such *Juristic Persons* as have no life; but are intended to be conducive to the preservation of life of some *Natural Persons.*

The expressions '*Natural Person*' and '*Juristic Person*' have been described by Dr. Holland as follows :—

"A 'natural' as opposed to an 'artificial,' person is such a human being as is regarded by the law as capable of rights or duties : in the language of Roman law as having a 'status.' As having any such capacity recognised by the law, he is said to be a person, or, to approach more

nearly to the pharseology of the Roman lawyers, to be clothed with, or to wear the mask (persona) of legal capacity."—*Holland, p.* 80, *4th ed.*

" 'Artificial,' 'conventional,' or 'juristic' persons are such groups of human beings or masses of property as are in the eye of the law capable of rights and liabilities, in other words, to which the law gives a status. Such groups are treated as being persons, or as sustaining the mask of personality."—*Holland p.* 82, *4th ed.*

The following passage occurs in Austin's Jurisprudence concerning 'Natural Person' and 'Juristic Person':—

" Fictitious or legal persons are of three kinds: 1st, some are collections or aggregates of physical persons: 2ndly, others are *things* in the proper signification of the term: 3rdly, others are collections or aggregates of rights and duties. The *collegia* of the Roman Law, and the corporations aggregate of the English, are instances of the first: the *prædium dominans* and *serviens* of the Roman Law, is an instance of the second : the *hæreditas, jacens* of the Roman Law, is an instance of the third."—*Austin, Lec. XII. p.* 364, *4th ed.*

What has been said by Austin and Dr. Holland regarding juristic persons does not include a corporation sole which to my mind is a real juristic person.

Mr. Edwards in his 'Compendium of the Law of Property in Land' regarding corporations says:—

" Corporations, or artificial persons created by law, are either, aggregate or sole..... A corporation sole consists of an Individual, as holder of a particular office, and his successors in office; who are incorporated by law in order to give them certain legal capacities, particularly that of perpetuity. In this sense the king or queen is a sole corporation; and every bishop, rector, or vicar is a sole corporation."—*p.* 451, *2nd edition.*"

Dr. Markby considers the expression 'corporation sole' a misnomer.

That eminent writer upon Jurisprudence says:—

"There is a curious thing which we meet with in English Law called a corporation sole. A corporation sole is always some sort of officer, generally an ecclesiastical officer. Rights and duties are frequently attached to an officer for the purposes of his office only. When an officer vacates his office these rights and duties pass to his successors; and it being convenient to distinguish the rights and duties which attach to a man *jure proprio* from those which attach to him *jure officii*, it is permissible to speak of the latter attached, not to the man, but to his office; just as it is permissible to speak of rights and duties which pass with the land from owner to owner as attached to the land. But this language is merely figurative, and there is no doubt that, as, in the one case, the rights and duties spoken of as attached to the land are really attached to the natural persons who are successively owners of the land, so, in the other case, the rights and duties spoken of as attached to the office are really attached to the natural persons who are the successive holders of the office. The term 'corporation sole' is, therefore, as it appears to me, a misnomer. The selection of persons who are styled corporation sole is a purely arbitrary one. The queen is said to be a corporation sole, and so is a parson. But the Secretary of State for India is not so, nor is an executor; though there is at least as good reason why both these persons should be treated as corporations sole as a parson. And on an examination of the position of so-called corporations sole it will be seen that they are no really juristical persons but only natural persons peculiarly situated as regards the acquisition and incurring of rights and duties."—*Markby p. 88, 3rd ed.*

The expression 'corporation sale' may not be a happy expression; but no doubt it imports with sufficient clearness

a *Juristic Person* not consisting of a group of Individuals or of a mass of property, but consisting of one *Natural Person.*

41. The *Limited Freedom* is the widest conception denoting the *Object* of *Right.* It includes:—

(*a*) Corporeal things, and

(*b*) Incorporeal things;

as the tangible and intangible results of the exercise of such *Freedom.* Such *Limited Freedom* also includes all *Objects* of *Public Rights* recognized by the Criminal Law. All the *Objects* of *Constitutional Rights* are within its range. Notwithstanding the inclusion of all the various classes of the *Object* of *Right* enumerated above, the scope of the *Limited Freedom* remains unexhausted; for all the possible *Objects* of *Natural Rights* which may be thought of and recognized, will, indeed, fall within its pale.

42. The expressions *Corporeal* and *Incorporeal* with reference to things have been defined as follows:—

"Incorporeal things are those which are not tangible. They are such as consist in a right, as an inheritance, a usufruct, a use, or obligations in whatever way contracted. Nor does it make any difference that things corporeal are contained in an inheritance; for fruits, gathered by the usufructuary, are corporeal; and that which is due to us by virtue of an obligation, is generally a corporeal thing, as a field, a slave, or money; while the right of inheritance, the right of usufruct and the right of obligation, are incorporeal."—*Sandars' Institutes, Lib. ii, Tit, ii, p.* 117, *7th ed.*

"Our senses tell us what things corporeal are: things incorporeal are rights, that is, fixed relations in which men stand to things or other men, relations giving them power over things or claims against persons. And these rights are themselves the objects of rights, and thus fall under the definition of things. For instance, the right to walk over another man's land is said to be an incorporeal thing; for we may have a claim or right to have this right, exactly as, if the land belonged to us, we should have a right to have the land. These rights over things were termed *jura in rem*, and these *jura in rem*, some of the more important of which are treated of in this part of the institutes, were almost exactly on the footing of *'res'* in Roman law, and were the subjects of real actions equally with things corporeal. (See Introd, section 50). This language of Roman Law is rather in accordance with popular language, and practical convenience than theoretically accurate. Strictly speaking, the ownership of a field is just as much incorporeal as the ownership of a right of way over a field, and in both cases the law only treats of the corporeal thing, the field, with reference to the incorporeal rights.

"We can hardly speak of the possession of a thing incorporeal, but still the actual exercise of the right so much resembles the occupation and using of a corporeal thing, that the term *quasi-possessio* has been employed to denote the position of a person who exercises the right without opposition, and exercises it as if he was its owner. As little can we speak of the *tradition* or delivery of a right; but just as *quasi-possession* is used to express a position analogous to that of a *possessor*, so *quasi-traditio* is a term used to signify the placing of a person in this position".—*Sandars' Institute Lib. ii, Tit. ii, p.* 116-17, *7th ed.*

"Things are divided by the Roman Lawyers into corporeal and incorporeal.

"Under corporeal things are included:—

"1st, *Things* (strictly so-called), that is to say, permanent external objects *not* persons. 2ndly, *Persons*, as considered from an aspect to which I shall advert immediately: that is to say, not as having rights, or as being bound by

obligations, but as the subjects or objects of rights and obligations residing in, or incumbent upon others. 3rdly, Acts and Forbearances, considered from the aspect to which I have alluded already: that is to say, as the objects of rights and obligations.

"By '*incorporeal things*,' they understood not the subjects of rights and obligations, but rights and obligations themselves: 'Ea quæ *in jure* consistunt:' velut '*jus* hereditatis,' '*jus* utendi fruendi,' '*jus* servitutis,' *obligationes*, quoquo modo contractæ'."—*Austin, Lec. xiii, p.* 371, *4th ed.*

"Objects which are sensible are what we call corporeal, as land, gold, corn, and so forth. But if we include amongst things, those objects which we can conceive, we have two classes of things, corporeal and incorporeal.

"Rights are incorporeal things: and the law deals with them as such. Thus a debt or a patent may be pledged, sold, and transferred either inter vivos or by will. In other words, a right may be itself the object of right.

"Whilst a right is itself necessarily incorporeal, the object of the right may be either corporeal or incorporeal. Thus if *A* owe a debt to *B*, the object of *B's* right is money and is corporeal; but the debt itself treated as the objcet of pledge, or sale, or bequest, is incorporeal."—*Markby, p.* 77, *4th ed.*

"A 'thing' is the Object of a Right, *i. e*, whatever is treated by the law as the object over which one person exercises a right, and with reference to which another person lies under a duty.

"Of 'things,' in this sense, there are two kinds:—

1. Material objects, *i. e*, physical things, 'res corporales,' such as a house, a tree, a stone, a horse, or slave.
2. Intellectual objects, artificial things, 'res incorporales' Rechtsgesammtheiten,' such as a patent, a trademark, a copyright, an easement, a hereditas, a bankrupt's estate, a universitas; *i. e.*, groups of advantages which for shortness are treated by the law as if they were material objects.

"So that, just as we have seen that what the law means by a 'Person' is the Subject of a Right or Duty, irrespectively of the subject being, as is more

frequently the case, or not being, a human individual; so a 'Thing' is what the law regards as the Object of Rights and Duties, irrespectively of that object being, as it usually is, a material object."—*Holland, p. 84, 4th ed.*

43. The expression 'Incorporeal thing' has been used by us; because it is a time-honoured expression. It must not, however, be lost sight of that the sense in which we employ it is not the same in which the Roman Jurists have used that expression. What we mean by that expression is the intangible *Object* of *Right* and not the *Right* itself whilst the Roman Jurists use it, as the passages already quoted show, to denote certain *Rights* themselves.

Rights, no doubt, are incorporeal in the sense of their being intangible *relations*. They, however, are not incorporeal *Objects* of *Right*; because a relation cannot, possibly, be identical with one of its component elements.

From the standpoint of the Roman jurists '*thing*' in the expression 'corporeal thing' would seem to import an *Object* of *Right* which is tangible. In the expression 'incorporeal thing' 'thing' is not convertible into *Object of Right* and seems to have been employed in a sense more extensive than that of the *Object of Right*.

From what we have just stated it is evident that *Right* and the *Object of Right* are two distinct conceptions. The former is a juristic *relation*, and must, therefore, always be intangible, whilst the latter is one of the two component ele-

ments of that juristic *relation* and may be tangible. Notwithstanding such a distinction between *Right* and the *Object of Right* Dr. Markby in the passage already quoted from him says that a 'right may be itself the object of right.' With deep respect to the learned jurist we, respectfully, submit that the proposition is unsound and would seem to be the result of mixing up '*Right*' with 'incorporeal thing' when the latter expression is taken to import an intangible *Object of Right.*

The following passage occurs in in Philimore's International Law :—"We have considered the nature of Movable and Immovable Property, of *Jura in re*; there remains a class of property which Jurists make a third class, *Jura ad rem*, that is, *incorporeal rights*, p. 453, Vol. IV., 3rd ed." This passage makes *incorporeal rights* a class of 'property' and by prefixing the epithet 'incorporeal' to 'rights' implies that there might be rights which are corporeal. Property, it must however be remembered is the *Object of Right* and not the *Right* itself. *Rights*, it must also be noticed, can never be corporeal.

44. If we considered all the gains whether Corporeal or Incorporeal, obtained by the exercise of the *Limited Freedom* of an Individual as his 'Property,' and classified such Property into tangible and intangible, much confusion of ideas would be obviated.

No description or classification of Tangible Property is needed; but a few remarks as to the scope of Intangible Property, in the

extensive sense given, by us, to that expression, will not be out of place. It would include :—

(*a*) Intangible Property gained by modes other than contract.

(*b*) Benefits *ex contractu*

(*c*) Remedial advantages *ex delicto.*

(*d*) Mental products resulting in physical benefits, such as copyrights, inventions.

(*e*) Mental products not culminating in physical benefits, such as good reputation, high esteem gained by excellent authorship, or character.

A distinction between classes (*d*) and (*e*) of the Intangible Property must, however, be borne in mind. " The chief way," says Herbert Spencer " in which this product of good conduct (cl. e) differs from other mental products is that though like them it may be taken away, it cannot be appropriated by the person who takes it away."—*Justice, pp.* 114-115.

The same idea has been beautifully expressed by Shakespeare in the following lines :—

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls :
> Who steals my purse steals trash ; 'tis something, nothing :
> 'Twas mine, 'tis his, and has been slave to thousands ;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.
>
> Othello—Act III—Scene III

45. What an Individual obtains by the exercise of his *Limited Freedom* has been denominated by us his Property ; but what he gets by *succession* or *gift* is not gained by any exercise of such *Freedom*, and, therefore, cannot be said to be

included in the definition of Property. In the same manner the Individual's energy itself, and his body and mind on which such energy depends, are not covered by the term Property. Nevertheless, what an Individual gets by *succession or gift* and his body and mind, are to be as much respected, for the preservation of life, both individual and collective, as the Property itself.

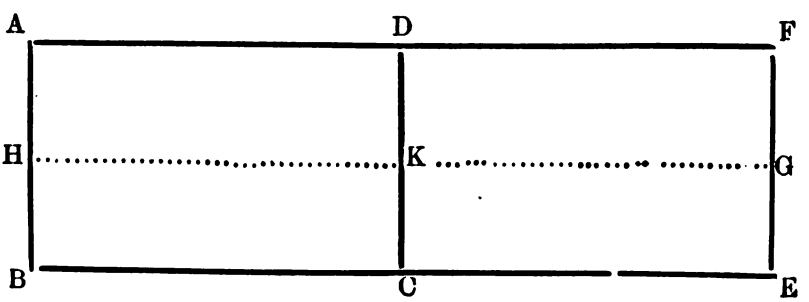
What an Individual gets by succession or gift is the transformed energy of some one, and forms part of the Property of the recepient by the laws of Society. The body, the mind and the energy, without which no *Limited Freedom* can be exercised, though not Property, are the sources of Property, and deserve, with reference to the *ultimate* end, at least, as much protection as the Property.

The *Object of Right* may be tangible or intangible. A book, a knife and a house are examples of the tangible *Object of Right*. A *malikanah*, a good will, and a debt are instances of the intangible *Object of Right*.

Things may become the *Object of Right* by direct *acquisition*. They may also become the *Object of Right* by Exchange. Let us see what happens, in the case of Exchange. For example, where B is the owner of 20 printed copies of a book and C is the owner of 20 watches; and they exchange those things. The result of the transaction

is as follows :—So much of the property of B which represents a definite quantity of his energy is, by the operation of the mutual consent, taken away from the ownership of B, and added to the property of C. Such a subtraction from the property of B, and addition to the property of C, is apt to disturb the approximate Equilibrium of the limited energy of B with its results, and of the limited energy of C with its results. The disturbance above mentioned can however be avoided if the balance between each of the two Individual's energy and its results is kept by taking off so much of the property of C, as by mutual agreement is deemed equal to that Property of B, which is taken off, and by adding that portion of C's property to the property of B. In short, what belonged to B becomes, by the operation of Exchange, the *Object of Right* of C, and in order to keep the approximate Equilibrium, what belonged to C becomes the *Object of Right* of B.

46. The above proposition may be, further, illustrated by a concrete example.



Smith and John are the *several* owners of two separate but adjacent pieces of land, namely, A B C D, and D C E F, respectively. The first plot produces wheat and the second, sugarcane. Each of the two owners agrees to give a portion of his land and takes in return a portion of the land belonging to the other. An exchange accordingly takes place, and Smith, instead of being the owner of A B C D, becomes the owner of A H G F, and John, instead of continuing to be the owner of D C E F, becomes the owner of H B E G. Before the exchange, the *Right* of Smith was to be perfectly free to deal with A B C D, as he pleased, and the *Duty* of John was to *Abstain* from trespassing upon that plot of land. After the exchange, the *Right* of Smith is to be perfectly free to deal with A H G F, as he pleases, and the *Duty* of John is to *Abstain* from trespassing upon that plot. John, as the owner of the plot, K C E G, has to perform all such acts, both legal and physical as are necessary to pass the ownership of that plot of land to Smith, and it is the *Duty* of John, as a *Person bound*, to *Abstain* from impeding the passing of the ownership of that plot of land to Smith; and from interfering with its use by Smith, as he pleases, after it has passed to him.

What has been said concerning the exchange of the plots of land applies with equal force, in principle, to cases where per-

sonal services are exchanged. For instance, where B agrees to sing, for three hours, in consideration of a picture to be painted for him by C, the transaction amounts to an exchange of services. The act of singing, which is a manifestation of the *Limited Freedom* of B, is, by the operation of the agreement, taken away from B and added to the *Limited Freedom* of C. In order, however, to keep the balance between each limited energy and its results, so much of the act of painting, as forms part of the *Limited Freedom* of C, and is, by mutual consent, deemed equal to the act of singing, is subtracted from the *Limited Freedom* of C, and added to the *Limited Freedom* of B. In this way the approximate Equilibrium between the two limited energies and their respective results is maintained, and the singing by B becomes the *Object* of *Right* (S. 52) of C, whilst the painting by C becomes the *Object* of *Right* of B. When the singing has thus become the *Object* of *Right* of C, B, so far as the future *performance* of the singing by him is concerned, is the *Debitor ex contractu* (S. 55). So far as the actual *Physical* doing of the promised singing is concerned, B is the *Spring of the Object of Right* (S. 53). And so far as *Abstinence* from interfering with the performance of the singing is concerned, B is the *Person bound*; and not the *Debitor ex contractu* who may become either the *Spring* of the *Object* of *Right* or the *Infringer* (S. 59).

The personal service of the promisor by the operation of the contract assumes, with reference to the *right in rem* of the promisee, to that service, a position analogous to the volitionless plot of land when it is the *Object of Right*; and the juristic capacity of the promisor to be the *Person bound* is confined to the remainder of his activity. The following illustration will, it is hoped, make our meaning clear. Let O denote the whole activity of the promisor, P, the personal service promised, and R, the remainder of the activity after the deduction of P. Such being the case, the *Person bound* = R or O − P.

CHAPTER VII.

ANALYSIS OF DUTY.

47. We have defined *Duty* as a *relation* between the *Person bound* and the *Limited Freedoms* of others. Duty, as a *relation* stands in need of more than one element, to come into existence. In the first place, there must be an Individual upon whom the duty is imposed, and there must, in the second place be some thing which would form the *Subject matter* of that *duty*. The Individual upon whom the duty is imposed is the *Person bound*, and the *Subject matter* of that *Duty* is his *Abstinence* from interfering with the *Limited Freedoms* of others. For the sake of brevity, we shall call the *Subject*

matter of Duty, *Abstinence*. Besides the aforesaid two elements no other element is requisite for the constitution of the *relation* called *Duty*.

48. To hold that the *Subject matter* of *Duty* must in every case be a passive *Abstinence* is a new proposition. So far as we are aware, *Duty* whereby its *Subject matter* is meant has, hitherto, been taken to include both *the doing* of something and the *not doing* of something. In support of what we have just said we quote the following passages :—

(*a*) (Duty means) "That which a person is bound by moral obligation to do or to refrain from doing that which one ought to do."– *Webster's Dictionary*.

(*b*) (Duty means) "Action or act that is done in the way of moral or legal obligation; that which one ought or is bound to do."—*New Dictionary on the Historical Basis*.

(*c*) "Every obligation or duty (terms, which, for the present, I consider synonymous) is positive or negative. In other words, the party upon whom it is incumbent is commanded to do or perform, or is commanded to forbear or abstain. In order to the fulfilment of a positive obligation, the act or acts which are enjoined by the command must be done or performed by, or on the part of, the obliged. In order to the fulfilment of a negative obligation, he must forbear from the act or acts which the command prohibits or forbids. In the one case, the active intervention of the obliged is necessary. In the other case, the active intervention of the obliged is not only needless but is inconsistent with the purpose of the obligation. An obligation to deliver goods agreeably to a contract, to pay damages in satisfaction of wrong, or to yield the possession of land in pursuance of a judicial order is a positive obligation. An obligation to abstain from killing, from taking the goods of another without his

consent, or from entering his land without his license is a negative obligation.—*Austin Vol. I, p.* 356, *4th edition.*"

(*d*) "Every legal duty (like every legal right) emanates from sovereign will. It flows from the command (express or tacit) of a monarch or sovereign body. And the party upon whom it is imposed is said to be legally obliged, because he is obnoxious or liable to those means of compulsion or restraint which are wielded by that superior. Every duty is a duty to do or forbear. A duty is relative, or answers to a right, where the sovereign commands that the acts shall be done or forborne towards a *determinate* party *other* than the obliged. All other duties are absolute. Consequently, a duty is absolute in any of the following cases: *1st.* Where it is commanded that the acts shall be done or forborne towards, or in respect of, the party to whom the command is directed. *2ndly.* Where it is commanded that the acts shall be done or forborne towards or in respect of parties *other* than the obliged, but who are not *determinate* persons, physical or fictitious. For example, towards the members generally of the given independent society; or towards mankind at large. *3rdly* Where the duty imposed is not a duty towards *man*; or where the acts and forbearances commanded by the sovereign or not to be done observed towards a *person* or *persons*. *4thly*. Where the duty is merely to be observed towards the sovereign imposing it: *i.e.* the monarch, or the sovereign number in its collegiate and sovereign capacity." —*Austin Vol. I, p.* 413, *4th edition*.

(*e*) 'Every law is the direct or indirect command of the sovereign authority, addressed to persons generally, bidding them to do or not to do a particular thing or set of things; and the necessity which the persons to whom the command is addressed are under to obey that law is called a duty."—*Markby p.* 90, *3rd edition.*

(*f*) "Duties are either to do an act or to forbear from doing an act. When the law obliges us to do an act the duty is called positive. When the law obliges us to forbear from doing an act, then the duty is called negative.

"Duties are further divided into relative and absolute. Absolute duties are those to which there is no corresponding right belong to any determinate person or body of persons; as, for instance, the duty to serve as a soldier, or to pay taxes. Relative duties are those to which there is a corresponding right in some person or definite body of persons; as, for instance, the duty or obligation to pay one's debts."—*Markby, page* 101, *3rd edition.*

(*g*) "Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right.

"Wherever any one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their duty.

"Where such furtherance is merely expected by the public opinion of the society in which they live, it is their moral duty.

"Where it will be enforced by the power of the State to which they are amenable, it is their 'legal duty.'

'The correlative of might is necessity, or susceptibility to force; of moral right is moral duty; of legal right is legal duty. These pairs of correlative terms express, it will be observed, in each case the same state of facts viewed from opposite sides.

'A state of facts in which a man has within himself the physical force to compel another to obey him, may be described either by saying that A has the might to control B, or that B is under a necessity of submitting to A So when public opinion would approve of A commanding and of B obeying, the position may be described either by saying that A has a moral right to command, or that B is under a moral duty to obey. Similarly, when the state will compel B to carry out, either by act or forbearance the wishes of A we may indifferently say that A has a legal right, or that, B is under a legal duty."
—*Holland, page* 72, *4th edition.*

49. The passages quoted in the preceding section are authority for the proposition that *Duty*, both in its ordinary

and also in its juristic sense may, sometimes mean an *act*, and may at other times mean an *Abstinence*. We are not concerned with the ordinary sense, in which the term is used; but regarding the Juristic sense of the word *Duty* we venture to submit that the application of the term *Duty* both to the active and passive phases of human conduct is due to the confusion of ideas induced by the mixing up of the *Object of Right* with the *Subject matter of Duty*.

Analytically speaking, the above two conceptions are distinct from each other. The *Object of Right* is one of the two elements which form the essential components of the *relation* called '*Right*.' The *Subject matter* of *Duty* is one of the two elements constituting the *relation* called *Duty*. The *Object of Right* may be a tangible property, such as a house, a field, a gun, a watch, and the like. It must not, however, be forgotten that the *Subject matter* of *Duty* must always be passive in its nature, namely, the *Abstinence* to be shown by the *Persons bound* towards the *Objects of Right* of others.

50. In order to elucidate what we have stated, in the last sentence of the preceding section, we have to examine the nature of *Duty* when in correlation with various kinds of *Right*.

The task, which we, thus, venture to undertake, is beset with some difficulty, for the conclusions at which we aim are in conflict with those arrived at by eminent jurists from some of whom we, have already, quoted certain passages (S. 48). Before proceeding further with our thesis it is necessary to define, explain, and compare, even at the risk of repetition, some of the important expressions which we employ in a technical juristic sense. Those expressions are as follows :—

(*a*) *Right* (Legal) = N.

(*b*) *Subject* of *Right* = A = *Person*.

(*c*) *Object* of *Right* = X = *Thing*

(*d*) *Spring of the Object of Right* = F = *Spring*.

(*e*) *Jus in rem* = P.

(*f*) *Jus ad rem* = Q.

(*g*) *Jus in personam* = V.

(*h*) *Duty* (Legal) = Y.

(*i*) *Subject matter of Duty* = Z = *Abstinence*.

(*j*) *Person bound* = B = *Abstainer*.

(*k*) *Creditor* = C.

(*l*) *Debitor* = D.

(*m*) *Infringer* = W.

(*n*) *Co-operative correlation* = Ny.

51. *Legal Right* has already (S. 30) been defined.

52. The *Subject of Right* is a *Natural* or *Juristic Person* who is entitled to the *Object* of *Right*. For the sake of brevity we may call him '*Person*' and may symbolize him as A.

The *Object* of *Right* is any tangible or intangible thing gained by the exercise of, or deemed belonging to the *Limited Freedom* to which a *Person* is entitled, for the preservation of life, both individual and collective, in a *Physico social Environment*. For the sake of brevity we term it '*Thing*' and symbolize it as X.

53. The *Spring of the Objeet of Right* is the promisor who under the contract *does* perform his part of the contract. For the sake of brevity we may use '*the Spring*' instead of the *Spring of the Object of Right*.

54. The meanings of the expressions *jus in rem*, *jus ad rem* and *jus in personam* will appear from the following passages:—

"The distinction between Rights which I shall presently endeavour to explain, is that all pervading and important distinction which has been assumed by the Roman Institutional Writers as the main groundwork of their arrangement: namely, the distinction between rights *in rem* and rights *in personam*; or rights which avail against persons generally or unniversally, and rights which avail exclusively against certain or determinate persons.

"The terms '*jus in rem*' and '*jus in personam*' were devised by the Civilians of the Middle Ages, or arose in times still more recent. I adopt them without hesitation, though at the risk of offending your ears.

For of all the numerous terms by which the distinction is expressed, they denote it the most adequately and the least ambiguously. The terms which were employed by the Roman Lawyers themselves, with various other names for the classes of rights in question, I shall explain briefly hereafter.

"At present, I will merely point out an ambiguity which perplexes and obscures the import of *jus in rem*.

"The phrase *in rem* denotes the *compass*, and not the *subject* of the right. It denotes that the right in question avails against persons generally; and *not* that the right in question is a right over a *thing*. For, as I shall show hereafter, many of the rights, which are *jura* or rights *in rem* are either rights over, or to, *persons*, or have *no* subject (person or thing).

"The phrase *in personam* is an elliptical or abridged expression for 'in personam certain sive determinatum.' Like the phrase *in rem*, it denotes the compass of the right. It denotes that the right avails exclusively against a *determinate* person or against *determinate* persons.

"Before I proceed to the distinction between the two classes of rights, I must yet interpose a remark relating to terms.

"In the language of the Roman Law, and of all the modern systems which are offsets from the Roman Law, the term 'Obligation' is restricted to the duties which answer to rights *in personam*. For the duties which answer to rights availing against persons generally, the Roman Lawyers had no distinctive name. They opposed them to *obligations* (in the strict or proper sense) by the name of *offices* or *duties*. Though office or duty is a generic expression, and comprises *Obligations* (in the strict or proper sense) as well as the duties which answer to rights *in rem*.

"This limitation of the term '*Obligatio*' by Roman Lawyers must be carefully noted. Unless it be clearly understood, their writings, as well

as those of most Continental Jurists, will appear an inexplicable riddle. Three-fourths of those who in our own country profess to read and talk about the French Code, cannot possibly understand a word of it, by reason of the sense in which this word is employed therein.

"Having premised these remarks, I proceed to state and to illustrate the important distinction in question, with all the brevity which is consistent with clearness.

"Rights *in rem* may be defined in the following manner: - Rights residing in person, and availing against other persons *generally*.' Or they may be defined thus:—'Rights residing in persons, and answering to duties incumbent upon other persons generally.' By a crowd of modern Civilians, *jus in rem* has been defined as follows:—'*facultas homini competens sine respectu ad certam personam*,' a definition I believe invented by Grotius.

"The following definitions will apply to personal rights:—'Rights residing in persons, and availing *exclusively* against persons specifically determinate:—Or, 'Rights residing in persons, and answering to duties which are incumbent *exclusively* on persons specifically determinate. By modern Civilians, a personal right is commonly defined in the following manner:—'*facultas homini competens in certam personam*' This definition also, like the former, was, I believe, devised by Grotius: in neither of them is there any great merit.

"According to these definitions, a right of the first class and a right of the second class are distinguishable thus. The duty which correlates with the latter is restricted to a person or persons specifically determinate. The duty which correlates with the former attaches upon persons *generally*.

"But though this be the essence of the distinction, these two classes of rights are further distinguishable thus. The duties which correlate with rights *in rem*, are always *negative*: that is to say they are duties to forbear or abstain. Of the obligations which correlate with rights

in personam, *some* are negative but *some* (and most) are *positive*: that is to say, obligations to do or perform."—*Austin, Vol. I, pp.* 379 *to* 382, *4th edition.*

"Having given an example or two of real rights (or of rights which correspond to duties *general* and *negative*), I will now adduce examples of personal rights. that is to say, rights which avail *exclusively* against persons *certain* or *determinate*, or which correlate with obligations, incumbent upon *determinate* persons, to do or perform, or to forbear or abstain.

"All rights arising from *Contracts* belong to this last mentioned class: although there are certain cases (to which I shall presently advert) wherein the right of ownership, and others of the same kind, are said (by a solecism) to arise from Contracts, or are even talked of (with flagrant absurdity) as if they arose from obligations (in the sense of the Roman Lawyers).

"Rights, which, properly speaking, arise from *Contracts* avail against the parties who bind themselves by contract, and also against the parties who are said to *represent* their persons, that is to say, who succeed on certain events to the aggregate or bulk of their rights; and, therefore, to their *faculties* or means of fulfilling or liquidating their obligations. But as against parties who neither oblige themselves by contract, nor represent the *persons* of the parties who oblige themselves by contract, the rights, which, properly speaking, arise from contracts, have no force or effect.

"Suppose (for example) that *you* contract with *me* to *deliver* me some moveable; but, instead of delivering it to *me* in persuance of the contract, that you sell and deliver to it another.

"Now, here, the rights which I acquire by virtue of the contract, are the following.

"I have a right to the moveable in question as against *you specially*. So long as the ownership and the possession continue to reside in *you*,

I can force you to deliver me the thing in specific performance of the contract; or, at least, to make me satisfaction, in case you detain it. After the delivery to the *buyer*, I can compel you to make me satisfaction for your breach of the contract with me.

"But *here*, my rights terminate. As against strangers to that contract, I have no right whatever to the moveable in question. And, by consequence, I can neither compel the buyer to yield it to *me*, nor force him to make me satisfaction as detaining a thing of *mine*. For '*obligationum* substantia non in eo consistit *ut aliquod nostrum faciat*, sed *ut alium nobis obstringat* ad dandum aliquid, vel faciendum, vel praestandum.' [Or rather, 'ad' *faciendum* (including 'dandum') vel '*non* faciendum.' 'Prœstandum' seems to include both].

"But if you deliver the moveable, in persuance of your contract with me, my position *towards other persons generally* assumes a different aspect. In consequence of the delivery by *you* and the concurring apprehension by me, the thing becomes *mine*. I have *jus in rem*: I have a right over the thing, or a right *in* the thing, as against all mankind: A right which answers to obligations universal and negative. And by consequence, I can compel the restitution of the thing from any who may take it or detain it, or can force him to make me satisfaction as for an injury to my right of ownership. In the language of Heineccius (a celebrated Civilian of the last century), 'Ubi rem *meam* invenio, ibi eam *vindico*: sive cum *eâ* personâ *negotium mihi fuerit*, sive non fuerit. Contra, si a bibliopolâ librum emi, esque cum *nondum mihi traditum* uendiderit iterum Sempronio, ego sane contra Sempronium agere nequeo: quia cum Sempronio nullum mihi unquam intercessit negotium. Sed agere debeo adversus bibliopolam a quo emi: quia ago ex contractu, *i.e.*, ex jure *ad* rem.'

"(All rights which arise from contracts and speaking generally) all rights *in personam*, are rights to *acts* or *forbearances* on the part of determinate persons, and to nothing more. At first sight, that species of

jus in *personam* which is styled *jus* AD *rem* may appear to form an exception. It may seem that the party who is invested with the right has a right to a thing, or a right in a thing, as against the party who lies under the corresponding obligation. But, in every case of the kind, the right of the party entitled amounts, in strictness, to this. He has a right to acquire the thing from the opposite party, or to compel the party to make the thing *his* by an *act* of conveyance or transfer. It is only by an ellipsis, or for the sake of brevity in the expression, that the party invested with the right is said to have a right to a *thing*.

"Take the following examples.

"*1stly*.—If you contract with me to deliver me a *specific* thing, I am said to have *jus* ad rem, that is to say, a right to the thing which is the subject of the contract, as against you specially. But in strictness, I have merely a right to the *acquisition* of the thing: a right of compelling you to give me *jus in rem*, *in* or *over* the thing; to do some *act*, in the way of grant or conveyance, which shall make the thing *mine*.

"*2ndly*. If you owe me money determined in point of *quantity*, or if you have done me an injury and are bound to pay me damages, I have also a right to the *acquisition* of a thing; but strictly and properly speaking, I have not a right to a *thing*. I have a right of compelling you to deliver or pay me moneys, which are not determined in specie, and as yet are not mine: though they will be determined in specie and will become mine by the act of delivery or payment.

"In this case, the nature of the right is obvious. For as there is no determinate thing upon which it can possibly attach it, cannot be a right to a thing.

"*3rdly*.—Suppose that you enjoy a monopoly by virtue of a patent; and that you enter into a contract with *me*, to transfer your exclusive right in my favour. Now, here, also, I have jus *ad* rem, but it is utterly impossible to affirm that I have a right to a thing

The subject of the contract is not a determined thing, nor a thing that can be determined. My right is this: a right of compelling *you* to transfer a right *in rem*, as I shall direct or appoint. If I may refine upon the expression which custon has established, I have not so properly *jus ad rem*, as jus AD JUS, *in rem*.

"And this, indeed, is the accurate expression for every case of that species of *jus in personam* which is styled *jus ad rem*. In every case of the kind, the party entitled has *jus in personam* ad *jus in rem acquirendam*. That is to say, he has a right, availing against a determinate person, to the acquisition of a right availing against the world at large. And, by consequence, his right is a right to an *act* of conveyance or transfer on the part of the person obliged.

"With regard to the other species of jus in *personam*, there can be no doubt. If you contract with me to do work and labour, or if you contract with me to forbear from some given act, it is manifest that my right is a right to acts or forbearances, and to nothing more.

"I will not advert to the class of cases above alluded to (page 384) which obscure the otherwise broad and distinct line of demarcation whereby these two great classes of rights are separated. Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract; the instrument in these cases wears a double aspect, or has a twofold effect; to one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance. When a so-called contract passes an estate, or, in the language of the modern Civilians, right *in rem*, to the obligor, itlis to that extent not a contract but a *conveyance*; although it may be a contract to some other extent, and considered from some other aspect. A contract is not distinguished from a conveyanee by the mere consent of parties, for that consent is evidently necessary in a conveyance as well as in a contract.

"For example, a contract for the sale of an immoveable in the French Law, is of itself a conveyance; there is no other; the contract or agreement to

sell, is registered, and the ownership of the immoveable at once passes to the buyer.

" By the provisions of that part of the English law which is called equity, a contract to sell at once vests *jus in rem* or ownership in the buyer, and the seller has only *jus in re aliena*. But according to the conflicting provisions of that part of the English system called peculiarly *law*, a sale and purchase without certain formalities merely gives *jus ad rem*, or a right to receive the ownership, not ownership itself: and for this reason a contract to sell, though in equity it confers ownership, is yet an imperfect conveyance, in consequence of the conflicting pretensions of law. To complete the transaction the legal interest of the seller must be passed to the buyer, in legal form. To this purpose, the buyer has only *jus in personam*: a right to compel the seller to pass his legal interest; but speaking generally, he has *dominium* or *jus in rem*, and the instrument is a conveyance. To this one intent only he has *jus in personam*; the seller remains obliged, and equity will enforce this obligation *in specie* against the seller, or will compel him to fulfil it by transferring his legal interest in legal form.

" Considered with relation to this obligation which correlates to a right in *personam*. the so-called contract, is a contract; but if there were only one system of law in England, and that law were the law administered by the Court of Chancery, it would not be a contract, but a mere conveyance.

" Briefly, no right to thing, properly speaking, is ever given by a contract. Where a thing is the subject of the contract, the right is not a right over, in, or to the thing, but a right to an act of transfer, or assignment of the thing on the part of the obligor.

" All rights founded upon injuries, or rights of action in the largest sense of the word. are rights *in personam*, equally with those which arise from contract and, like all rights in *personam*, are rights to acts or forbearances on the part of determinate persons, and to nothing more. Some confusion has arisen upon this point from the *actio in rem* of the Roman lawyers. Actio in rem was a name given by the Roman lawyers to the form of action

appointed for the vindication of rights founded on injuries. The name does not imply that the right vindicated is a right *in rem*, but is an abridged expression to denote an action founded on an injury against *jus in rem*."—*Austin, Vol.* 1, *pages* 384—389, *4th edition.*

"In order that I may further illustrate the import of the leading distinction in question, I shall direct your attention to those rights *in rem* which are rights over *Persons*, and to certain rights *in rem*, or availing against the world at large, *which have no determinate subjects* (persons or things.)

"Looking at the *obvious* signification of the epithet *real*, (and of the phrase *in rem*, from which the epithet is derived,) we should naturally conclude that a *real* right must be a right in a *thing*. And, accordingly, by many of the modern expositors of the Roman Law, the term *real right* or *jus in rem*, (which terms I shall hereafter use as equivalent expressions unless the contrary is indicated) is restricted to *such* of the rights availing against the world at large, as are rights over *things* properly so called, that is to say, over permanent external objects which are not persons, as distinguished both from persons and from those transient objects which are called acts and forbearances.

"When I say that they restrict the term in the manner which I have now mentioned, I mean that they so restrict it when they state its meaning in *generals*, or when they attempt to *define* it. For, when they are occupied with the *detail* of the Roman Law they unconsciously deviate from their own insufficient notion, and extend the term to numerous rights which are not rights over *things*. For example, it is admitted or assumed by every Civilian, that the right of the Roman heir over or in the *heritage* is a *real* right.

"I say the right of the heir over or in the *heritage*. For, independently of the *several* rights which devolve to him from the testator or

intestate, he has a right in the *aggregate* which is formed by those several rights; and which aggregate, coupled with the obligations of the deceased, constitute the complex whole which is styled the *hereditas* or heritage. In this heritage, so far as it consisted of rights, the heir had, by the Roman Law, a right which availed against the world at large, and which he could maintain against any one who might gainsay or dispute it, by a peculiar judicial proceeding called *petitio hereditatis*, which proceeding was an action *in rem*, that is, an action grounded on an injury to a real right, and seeking the restoration of the injured party to the unmolested exercise of the right in which he has been disturbed.

"But though this right of the heir is indisputably *jus in rem*, it is not a right *over* or *in a thing*, or *over* or *in things*. It is properly a right in an aggregate of rights; partly, perhaps, consisting of rights over *things*, but partly consisting of rights which are of a widely different character: namely, of *debts* due to the testator or intestate; or of such *rights* of *action* vested in the testator or intestate, as devolved to his heir or general representative. Here then was a case, and most important one, in which the writers to whom I have referred departed from their own definition, and approached to that adequate notion of *jus in rem*, which I have endeavoured to impress upon my hearers; that which considers it to denote only the compass or range of the right: namely, that it avails against the world at large, in contradistinction to *jus in personam* which avails only against certain or determinate individuals.

"By *jus in rem* and *jus in personam*, the authors of those terms intended to indicate this broad and simple distinction; which the Roman lawyers also marked by the words *dominium* and *obligatio*, terms, the distinction between which was the groundwork of all their attempts to arrange rights and duties in an accurate or scientific manner. This is not a hasty surmise, but the result of a careful and ample induction founded on a most diligent study of the Institutes of Gaius and of Justinian, and an attentive perusal of the Pandects or

Digest of the latter. Nor is this opinion confined to myself; otherwise I should, of course, feel much less confidence in its correctness. But I share it with such men as Thibaut and Feuerbach, men of indefatigable perseverance and of a sagacity never surpassed. The importance of the distinction will appear in glaring colours, when I pass from the *generalia* into the detail of the science. I must, for the present, content myself with illustrating it in a general and passing manner; and shall shew its applications hereafter."—*Austin, Vol. I, pp.* 393-395, *4th edition.*

"In the present Lecture, I shall endeavour to explain the nature or essence which is common to all rights. Or (changing the expression) I shall endeavour to indicate the point at which they meet or coincide; or to shew the properties wherein they resemble or agree; or to state *that* which may be affirmed of rights *universally*, or without respect to the generic and specific differences by which their kinds and sorts are separated and distinguished.

"In trying to accomplish this purpose I shall proceed in the following order:—

"1st, I shall endeavour to state, in general expressions, the nature, essence, or properties, common to *all* rights. 2ndly. I shall advert briefly to certain *classes* of rights; and I shall endeavour to shew, that they agree in nothing, excepting those common properties. 3rdly, I shall examine certain *definitions* of the term right; and I shall endeavour to elucidate the common nature of rights, by shewing the vices or defects of those definitions.

"Every right is a right *in rem*, or a right *in personam*.

"The essentials of a right *in rem* are these:

"It resides in a determinate person, or in determinate persons, and avails against *other* persons *universally* or *generally*. Further, the duty with which it correlates, or to which it corresponds, is negative: that is to say, a duty to forbear or abstain. Consequently, all rights *in rem* reside in determinate persons, and are rights to forbearances on the part of persons *generally*.

"The essentials of a right *in personam* are these :

"It resides in a determinate person, or in determinate persons, and avails against a person or persons certain or determinate. Further, the obligation with which it correlates, or to which it corresponds, is negative or positive : that is to say, an obligation to forbear or abstain, or an obligation to do or perform. Consequently, all rights *in personam* reside in determinate persons, and are rights to *forbearances or acts* on the part of the determinate persons.

"It follows from this analysis first, that all rights reside in *determinate* persons. Secondly, that all rights correspond to duties or obligations incumbent upon *other* persons : that is to say, upon persons distinct from those in whom the rights reside. Thirdly, that all rights or rights to *forbearances* or *acts* on the part of the persons who are bound.

"These (I believe) are the only properties wherein all rights resemble or agree.

"Consequently, right *considered* in *abstract* (or apart from the kinds and sorts into which rights are divisible) may be conceived and described generally in the following manner :—

"Every legal duty arises from a command, signified, expressly or tacitly, by the Sovereign of a given Society.

"Every legal duty binds the party obliged, by virtue of a legal sanction. In other words, in case the party obliged violate the duty imposed upon him, he will be obnoxious or liable to evil or inconvenience, to be inflicted by sovereign authority.

"[Now the person who is subject to a duty, or upon whom a duty is incumbent, is bound to do or to forbear from, some given act or acts. And further, he is bound to do, or to forbear from, the given act or acts absolutely or relatively. That is to say, *without respect* to a determinate person or persons, or towards a determinate person or determinate persons].

"The *objects* of *duties* are Acts and Forbearances. Or (changing the expression) every party upon whom a duty is incumbent, is bound to do or to forbear. Or (changing the expression again) the party violates the duty which is incumbent upon him, by *not* doing some act which he is commended to do, or by doing some act from which he is commended to abstain.

"Duty is the basis of right. That is to say, parties who *have* rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon *other* parties.

"Or (in other words) parties invested with rights *are* invested with rights, because other parties are bound by the command of the sovereign, to do or perform acts, or to forbear or abstain from acts.

"In short, the term 'right' and the term '*relative* duty' signify the same notion considered from different aspects. Every right supposes distinct parties. A party commanded by the sovereign to do or to forbear, and a party *towards* whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a *duty*: that is to say, a *relative* duty. The party *towards* whom he is commanded to do or to forbear, is said to have a *right* to the acts or forbearances in question.

"Or the meaning which I am labouring to convey may be put thus.

"Wherever a right is conferred, a relative duty is also imposed: the right being conferred upon a certain or determinate party, *other* than the party obliged. Or (changing the expression) a party is commanded by the sovereign to do or to forbear from acts, and is commanded to do or forbear from those given acts *towards*, or *with regard to*, a party *determinate* and *distinct from himself*.

"For (as I shall shew hereafter) duties towards oneself and duties towards persons indefinitely, can scarcely be said with propriety to correlate with rights. As against *others* I have a right to my life. For

others are bound or obliged to forbear from acts which would destroy or endanger my life. But it can scarcely be said, with propriety, 'that I have a right to my own life *as against myself*. Although I am legally bound to abstain from *suicide*, by virtue of certain sanctions whose nature I shall explain hereafter. And the same may be affirmed of duties towards persons indefinitely: that is to say, towards the community at large, or towards mankind generally.

"A law which prohibits the importation of certain foreign commodities, to the end of encouraging the production of the corresponding domestic commodities imposes a *duty to forbear* from importing the commodities which it is said to prohibit. But it can hardly be said, with propriety, that the law confers a *right*. For there is no *determinate* party who would be injured by a breach of the duty, or towards or with regard to whom the prohibited act is to be forborne. In the technical language of certain systems, breaches of such duties are offences against the sovereign, and the sovereign is invested with *rights* answering to those duties.

"But to impute *rights* to the sovereign is to talk absurdly. For rights are conferred by commands issuing *from* the sovereign.

"As violating commands issuing from the sovereign, breaches of the duties in question are offences against the sovereign. But so is a breach of every imaginable duty. For all duties are the creatures of sovereign will, or are imposed by Laws or Commands emanating from the Sovereign or State. The truth is, that duties towards oneself, and towards person indefinitely, are *absolute* duties. That is to say, there is no *determinate* party whom a breach of the duty would injure, or towards or in respect of whom the duty is to be observed.

"It is difficult to indicate the import of the term right, (considered as an abstract expression embracing all rights). For right (as thus considered) is so extremely abstract—is so extremely remote from the particulars which are comprised in its extension—that its meaning or import is, as it were, a shadow, and closely verges upon the confines of *no* meaning.

"All the ideas or notions which are comprehended by that slender meaning may, I think, be compressed into the following propositions.

"Right, like Duty, is the creature of Law, or arises from the command of the Sovereign in a given independent Society.

"Every right is created or conferred in the following manner.

"A person or persons are commanded to do or to forbear *towards*, or with regard to *another* and a *determinate* party.

"The person or persons to whom the command is directed, are said to be *obliged* or to lie under a duty.

"The party *towards* whom the duty is to be observed, is said to have a *right*, or to be invested with a right.

"In order that we may conceive distinctly the nature of rights we must descend from right in abstract to the species or sorts of rights. We must take a right of a given species or sort, and must look at its scope or purpose. That is to say, we must look at the end of the lawgiver in conferring the right in question, and in imposing the duty or obligation which the right in question implies.

"Now the ends or purposes of different rights are extremely various. The end of the rights *in rem* which are conferred over things, is this: that the entitled party may deal with, or dispose of, the thing in question in such or such a manner and to such or such an extent. In order to that end, other persons generally are laid under duties to forbear or abstain from acts which would defeat or thwart it.

"But from this general notion of rights over things, we must descend to the species into which they are divisible. For the ends of the various rights which are conferred over things, differ from one another. And what I have said of rights *in rem* over things will apply to such rights over persons as avail against other persons generally; and also to such rights availing against other persons generally as have no determinate subjects.

"The ends or purposes or rights *in personam* are widely different from those of rights *in rem*.

"The ends or purposes of the various rights *in personam* are again extremely different from each other.

"A right has been defined by certain writers, as that security for the enjoyment of a good or advantage which one man derives from a duty imposed upon another or others. It has also been said that rights are powers: powers over, or powers to deal with, things or persons.

"Objections: 1st.—*All* rights are not powers over things or persons. All (or most) of the rights which I style rights *in personam* or merely rights to act or forbearance. And many of the rights which I style *jura in rem* have no subjects (persons or things.)

"2ndly.—What is meant by saying that a right is a power? The party invested with a right, is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the state. The power resides in the state; and by virtue of the power residing in the state, the party invested with the right is enabled to exercise or enjoy it.

"It may, indeed, be said that a man has a power over a thing or person when he can deal with it according to his pleasure, free from obstacles opposed by others. Now in consequence of the duties imposed upon others, he is thus able. And, in that sense, a right may be styled a power. But, even in this sense, the definition will only apply to certain rights to *forbearances*. In the case of a right to an act, the party entitled has not always (or often) a power.

"3rdly.—*Facultas faciendi (aut non faciendi)*. This definition is open to the same objections as the last definition.—'Facultas,' what?

"4thly.—'A person has a right, when the law authorizes him to exact from another and act or forbearance.' The test of a right:—That (independently

of positive provision) the acts or forbearances enjoined are not incapable of being enforced civilly or in the way of civil action: *i. e.*, at the discretion or pleasure of the party towards whom they are to be done or observed. This would distinguish them from absolute duties. For to talk of a man enforcing a duty against himself is absurd. And where there is no determinate person towards whom it is observed, it is incapable of being enforced civilly.

"Right;—the capacity or power of exacting from another or others acts or forbearances;—is nearest to a true definition."—*Austin, Vol. I. pp.* 405-410, *4th edition.*

"Sometimes a right exists only as against one or more individuals, capable of being named and ascertained; sometimes it exists generally against all persons, members of the same political society as the person to whom the right belongs; or, as is commonly said, somewhat arrogantly, it exists against the world at large. Thus in the case of a contract between *A* and *B*, the right of *A* to demand performance of the contract exists against *B* only; whereas in the case of ownership, the right to hold and enjoy the property exists against persons generally. This distinction between rights is marked by the use of terms derived from the Latin: The former are called rights in *personam*; the latter are called rights *in rem*.

"The term right '*in rem*' is a very peculiar one; translated literally it would mean nothing. The use of it in conjunction with the term *in personam* as the basis of a classification of actions in the Roman Law has been explained above, and its meaning will be further illustrated by two passages in the Digest of Justinian. In Book iv. tit. 2, section 9, the rule of law is referred to—that what is done under the influence of fear should not be binding: and commenting on this it is remarked, that the lawgiver speaks here generally and *in rem*, and does not specify any particular kind of persons who cause the fear; and that therefore the rule of law applies, whoever the person may be. Again, in Book xliv. tit. 4, section 2, it is laid down

that, in what we should call a plea of fraud, it must be specially stated whose fraud is complained of, and not *in rem*. On the other hand, it is pointed out that, it is shown whose fraud is cmplained of, it is sufficient; and it need not be said whom the fraud was intended to injure; for (says the anthor of the Digest) the allegation that the transaction is void, by reason of the fraud of the person named, is made *in rem*. In all these three cases *in rem* is used as an adverb, and I think we should express as nearly as possible its exact equivalent, if we substituted for it the English word generally. In the phrase right *in rem* it is used as an adjective, and the equivalent English expression would be a general right,' but a more explicit phrase is a right availing against the world at large: and if this, which is the true meaning of the phrase right *in rem*, be carefully remembered, no mistake need occur. On the other hand, if we attempt to translate the phrase literally, and get it into our heads that a thing, because rights exist in respect of it, becomes a sort of juristical person, and subject to duties we shall get into endless confusion.

"The term right in *personam*, on the other hand, means a right which can be asserted against a particular person, or set of persons, and no others.

"The persons to whom a right *in rem* belongs may be changed to any extent within the limits allowed by the law, but the persons upon whom the duty corresponding to a right *in rem* is imposed cannot be changed, because all persons are under that duty. Either the persons to whom a right *in personam* belongs, or the persons on whom the duty corresponding to a right *in personam* is imposed, may be changed within the limits allowed by the law."—*Markby, pp.* 96-97, *3rd ed.*

"The idea of a personal right has been variously defined by jurists to whom it is known by the term *jus in personam*, but in all those definitions the essential principle is recognized that such right avails exclusively against persons specifically determinate. In the case of an

occupancy-tenant the right created in his favour by the statute is not a right which binds the landlord alone; in other words, it is not a right which has for its correlative the obligation of only the landlord of the soil. On the contrary, it is a right in land, a right which avails against all persons universally. It is therefore not a *jus in personam*, and it is clear that it cannot be called a *jus ad rem*, for the class of right is only a species of personal right, and implies the right of compelling a determinate person or persons to do any specific act, the commission of which, would confer a real right known in the language of jurisprudence as *jus in rem* or a permanent right in and over a thing which forms the subject of the right. In the case of an occupancy tenant the right which the Legislature has conferred upon him under Act XVIII of 1873 is such as, subject to the limitations provided by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy right subsists in and goes with the land. The right, no doubt, falls far short of absolute ownership or *dominion* defined by Austin to be a "right over a determinate thing indefinite in point of *user*, unrestricted in point of *disposition*, and unlimited in point of *duration*." But one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of ownership—called by the Romans *nuda proprietas*—remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself, in other words, which may be granted to one person over an object of which another continues to be the owner—are known as *jura in re aliena*." (*Holland on Jur. p.* 144.)

"Thus *jura in re aliena* are such of the rights *in rem*, availing against the world at large, as are acquired over and in the absolute ownership or dominion of another person in whom the ownership still continues. Among such rights was a right known to Roman Jurispru-

dence as emphyteusis, which has been defined to be the right of a person who was not the owner of a piece of land, to use it as his own in perpetuity, subject to forfeiture on non-payment of a fixed rent, and on certain other contingencies."—*Mahmud, J. I. L. R., All., Vol. V. of* 1883, *p.* 130.

55. The meanings of the terms *creditor* and debitor will appear from the following passages:—

"The three words, *dare, facere prastare*, were used to e brace all the possible duties an obligation could create. Either the person bound by the obligation was obliged *dare, i.e.*, to give the absolute ownership or the possession of a thing, or *facere*, that is, to do or not to do some act; or *prastare*, that is, to make good something, as to make good a loss, or to furnish any advantage or thing, the yielding of which could not be included in the limited sense of the word *dare*. Every person who possessed a personal right against another was termed a *creditor*, and every one who owed the satisfaction of a claim or was the subject of a personal right, was a *debitor* The word *creditor*, of course, points to those transactions in which the possessor of the right trusted the person who was the subject of it, but the application of the terms was perfectly general, and must not be confounded with the English usage of the words creditor and debtor."—*Sandars' Introduction. p. lvi. 7th ed.*

"*The Meaning of the Term Obligatio:—Obligatio*, as the text in the initial paragraph tells us, is a 'tie of law by which we are so constrained that of necessity we must render something according to the laws of our state,' *i.e.*, the rules of either the strict civil law or the prætorian law. It was because it could be enforced by an action that tie was binding on the person bound, *debitor* (*debitor intellegatur is a quoinvito exigi pecunia potest* D. I. 16. 108) in favour of the *creditor*, these words *debitor* and *creditor* being used in a general sense, in

Roman Law, for the person bound and the person profiting by the tie. That which the debtor is thus bound to render is in the text expressed by the general word *solvere*; and this general term includes three kinds of such rendering *dare, facere, præstare*. *Dare* meant to give either the property in a thing, as in the contract of *stipulatio*, or only the possession of it, as in the case of the seller in the contract of sale; *facere*, to do something, as, for example, the mendatory or agent had to do; what he had undertaken to do; and *præstare*, to make good, as the person guilty of negligence had *præstare culpam* to make good his fault. These three terms, however, were not kept distinct, *facere* and *præstare* being constantly used in the sense of *dare*. In every case, however, it was a sum of money that was the real thing that the debtor was forced to give, as the remedy for every breach of contract was put into the shape a of pecuniary equivalent, unless the debtor could and did execute his contract under compulsion."—*Sanders, p.* 320-321, *7th ed.*

56. *Legal Duty* has been defined in Section 30.

57. The *Subject matter* of *Duty*, symbolized **Y**, as we have already indicated in *section* 49 is the *Abstinence* to be shown by the *Person bound*, towards the *Object* of *Right* belonging to the *Subject* of *Right* who is not the *Person bound*.

58. The *Person bound*, symbolized here as B, is that person upon whom the duty to *abstain* is cast. For the sake of shortness we shall call the *Person bound* the *Abstainer*.

59. The *Infringer* is an *Abstainer* who in violation of his *Duty* interferes with the enjoyment of the *Object* of

same time be observant of his *Duty* towards all other holders of *Right*. To express the same idea from a different stand point, we may say that the *Person bound* in order to abide by his *Duty* to all others need not stop the enjoyment of any of his *Rights*.

The *Subject of Right* may waive any of his *Rights*, whilst a *Person bound* may not disregard his *Duty* with impunity.

62. The distinction between the *Object of Right* (*Thing*) and the *Subject matter Duty* (*Abstinence*) is as follows:—

The *Thing* is one of the two component elements of *Right* and may be corporeal or incorporeal whilst *Abstinence* is one of the two constituents of *Duty* and cannot be corporeal. The *Thing* is, or is deemed to form, part and parcel of the *Limited Freedom* of the *Subject of Right* (*person*): even where the *Thing* is an act of the promisor such act by the operation of the contract is deemed to form part and parcel of the activity of the promisee. *Abstinence*, in the eye of Jurisprudence, has no positive existence at all, and is a passive attitude of the *Abstainer* towards the multitude of *Limited Freedoms*. Such being the case, *Abstinence* may not be deemed to form part and parcel of the *Limited Freedom* of the *Abstainer*. The *Thing* may, as we have shown (S. 46), be an act or a series of acts to be done by the promisor for the benefit of the promisee. When the *Thing*

is an act it may be over as soon as that particular act has been done. *Abstinence*, however, stands on a very different footing. It never can be, in the first place, a particular act. It can, in the next place, have no temporary existence. The *Thing*, when it happens to be a particular act may therefore be performed in a few minutes; but the *Abstinence* required of the *Abstainer* may, and in a majority of cases does, last for his life.

The analytical distinction between the *Object of Right*, and the *Subject matter of Duty* becomes prominent, when the acts promised are rendered impossible, either by the act of God, or by the act of the party. Although the practical result, so far as the non-performance, and the promisee are concerned, is exactly the same, yet the promisor in the former case is not a wrong-doer, but in the latter case he is. When the acts promised to be done are not done, because of the act of God, the *source* of the *Object* of *Right* is, as it were dried up, and the *Object of Right*, without any *Infringement* on the part of the promisor, ceases to exist. When the promised acts are not performed as a result of *non-Abstinence* from interference by the promisor, he, as a *Person bound*, violates his *Duty* of being *passive*; and is, therefore, a wrong-doer. Without the analytical separation of the *Object of Right* from the *Subject matter of Duty* the distinction between these two cases of non-performance is not possible.

63. The expressions :—

i.—Debitor ex-contractu :
ii.—Abstainer :
iii.—Infringer: and
iv.—Spring

have to be distinguished from one another.

First, as to the distinction between the *Debitor ex-contractu* and the *Abstainer*. It is evident from the import we have given to the term *Abstainer* that we cannot conceive of the *Abstainer* unless we have conceived of the *Person* and the *Thing*. In other words, we cannot conceive of the *Abstainer* unless we have contemplated of a *right in rem*. For example, B can be under no *Duty* unless A has a *Right* and there can be no *Right* (S. 30) unless there is a *Thing* over which that *Right* is to be exercised. The act to be done by the promisor for the benefit of the promisee is a *Thing* from the point of view we have ventured to take. Such being the case it is sufficiently clear that the conception the *Abstainer* depends on and has reference to a *right in rem*.

The conception the *Debitor ex contractu*, in the nature of things themselves, has no reference to a *right in rem*. On the contrary, it depends upon the *formation* of a contract whereby the juristic capacity of being the *Debitor ex contractu* is created. For example, when B sells a watch to A. A's *right ex contractu*

is to have the watch or a substitute for it in the shape of damages, and B's *duty* according to the English jurists is do *do* some act for the benefit of A. In our humble judgment the *Duty*, or, orrrectly speaking, the *Subject matter of Duty* of B is to *abstain* from interference with the delivery of the watch to A. We shall explain the above proposition later on (S. 75, et seq.).

What we have just said regarding the distinction between the *Debitor ex contractu* and the *Abstainer* is not all. The *Debitor ex contractu* connotes a definite Individual, whilst the *Abstainer* connotes a *class*. The state of being a *Debitor ex contractu* cannot come into existence unless there has been a juristic act of a particular kind on the part of the Individual who thereby becomes a *Debitor ex contractu*. The state of being the *Abstainer* arises in a very different manner. Here no particular juristic act on the part of the Individual is requisite. The capacity of being the *Abstainer* arises not only independently of the intention of the Individual; but even against his will. B, for instance, cannot be the *Debitor ex contractu* towards A, unless B has entered into a contract with A; but no sooner A acquires some property the capacity of being the *Abstainer* is imposed upon B, no matter how unwilling he may be to have that capacity.

The state of being a *Debitor ex contractu*, moreover, is a temporary state, and comes to an end as soon as the promisor has performed his part of the contract. Such, anyhow, is not the case with the state of being the *Abstainer*. That state is not temporary and may last so long as the promisor lives.

Again, the state of being the *Debitor ex contractu* may be terminated by one of those modes which are recognized by Law, and some of which are in the power of the *Debitor ex contractu* ; but the state of being the *Abstainer* may not in many cases be terminated, at all, by the act of the party, and when it can be so terminated, no act on the part of the *Abstainer* can terminate it.

Every *Debitor ex contractu* must be the *Abstainer* from interfering with what he has undertaken to fulfill ; but no *Abstainer* can be the *Debitor ex contractu* unless he enters into a contract with some Individual.

61. The *Abstainer* not only connotes a class ; but the number of Individuals included in that class in *rights in rem* as well as in *rights in personam* is exactly the same.

To illustrate the connotation of the *Abstainer* and the *Debitor ex contractu* numerically we take the following example. An island is inhabited by one thousand (1,000)

Individuals. Each of them owns some property and all of them are co-operating with one another. Let A be one of such Individuals and let X be his property. According to our terminology A is the *Person*, X the *Thing*; and as A's *Right* to X is a *right in rem*, every one in the island except A is included in the term *Abstainer*. Such being the case, if we classify the whole population of the island with reference to the *right in rem* of A to X, that population consists of :—

i.—The *Person* = one Individual: and

ii.—The *Abstainers* = 999 Individuals.

We may now suppose that B, one of the inhabitants of the island, in question, promises to do a definite act for the benefit of A. No sooner the contract between A and B is validly formed than things, from a juristic point of view, assume a new complexion. B by virtue of the contract is invested with the capacity of being the *Debitor ex contractu*, A with the capacity of being the *Creditor ex contractu*, and 999 Individuals with the capacity of being *Abstainers* with reference to the *Right* of A to the act to be done by B.

The whole population with reference to the *right ex contractu* and without contemplating *Infringement*, in the example under consideration, consists of the following classes:—

i.—The Debitor ex contractu:

ii.—The Creditor ex contractu :

iii.—The Person, and

iv.—The Abstainers.

65. A comparison of the above two classifications shows that the first classification consists of two classes only whilst the number of classes in the second, amounts to four. It is, however, certain that the increase in the number of classes cannot increase the number of Individuals in the island. Make the number of classes as many as we please ; we cannot, however, thereby, make the Individuals in the island more than 1000.

Such being the case there are only two alternatives :—

i.—The number of Individuals covered by the class '*Abstainer*' is less in the case of a *right in personam* than in the case of a *right in rem* : or,

ii.—The number of Individuals covered by the class '*Abstainer*' in both cases is the same ; but an Individual does a juristic act whereby the Individual combines in himself two juristic capacities ; namely, *Debitor ex contractu* and the *Abstainer*.

In other words, we may either say that the number of *Abstainers* in the case of the *right in rem* in question is 999, whilst the number of those *Abstainers* in the case of the *right in personam* in the example is only 998, or we may

say that the number of *Abstainers* in both cases is 999, but that one Individual in the case of the *right in rem* combines in himself the two capacities of the *Debitor ex contractu* and of the *Abstainer*.

The first alternative is not tenable; for, if we were to hold that the number of *Abstainers* in a *right in personam* is less than in a *right* in *rem*, the natural conclusion would be that in the case of a *right in rem* the whole world[1] would be bound to *abstain*, but that in the case of a *right in personam* the whole world would not be bound to *abstain* and that one Individual might interfere with the full enjoyment of the *Thing* without incurring any liability. To show the absurdity of such a conclusion I need only say that to confer a *Right* upon some one and to permit another to interfere with that *Right* with impunity is worse than conferring no *Rights* at all.

66. The first alternative being untenable, we have to accept the second alternative and to hold that the number of

[1]The expression 'the whole world when employed to denote the *compass* of the individuals who are bound to *abstain*' means all the Individuals except the holder of the Right who are amenable to the same state. If we imagine a state which has brought under its sway the whole world then that the juristic import of that expression would be co-extensive with the literal sense thereof.

Abstainers in the case of a *right in personam* is the same as that in the case of a *right in rem*; but that B one of such Individuals combines in himself the two capacities of being the *Debitor ex contractu* and of being the *Abstainer*. Viewed in this light, the second classification mentioned in S. 64 means that the :—*Debitor ex contractu* the *Abstainer*, and the *Spring* are combined in one Individual. The *Creditor ex contractu* and the *Person* are united in another Individual. The *Abstainer* includes except the holder of the *right* the whole world represented in the case, in question, by 999 Individuals and the promisor, invested with the three aforesaid capacities, is one of 'the *Abstainers*.'

To make the position taken up by us clear we may imagine that out of the one thousand (1,000) inhabitants in the island, five hundred Individuals form themselves into a corporation, and as such, enter into a contract with A to do certain act for his benefit. By virtue of the contract the corporate body B is the *Debitor ex contractu*, and if we were to hold that the *Debitor ex contractu* is *not* bound to *abstain*, but that only 499 Individuals are bound to *abstain*, the proposition, I need hardly say, would be unsound.

It may, no doubt, be said that as the formation of a juristic corporate body turns 500 Individuals into *one Juristic Person*

the number of the Individual *not* bound to *abstain* is still *one*. The illustration, however, serves the purpose of showing that five hundred *Natural Persons* may be deemed as *one Juristic Person* and that a juristic capacity is not to be ignored.

67. The *Abstainer* is distinct from the *Infringer* in many respects. The *Abstainer*, as we have shown (S. 63, et seq.), imports a *class* which invariably consists of the same number of Individuals, whilst the *Infringer* denotes a definite Individual who must have been included in the class '*Abstainer*.' An Individual who has not the capacity of being an *Abstainer* cannot have the capacity of being an *Infringer*; but an *Abstainer* can not have been an *Infringer*.

No Individual can be an *Infringer* unless he has done some positive act of interference with the enjoyment of the *Thing* by the *Person*; but in the case of an *Abstainer* no positive act is requisite. When A is the holder of a *Right* all Individuals included in (non-A) may abide by their duty, at one and at the same time, towards all and every *Object of Right* belonging to A. Likewise, *one* Individual may abide by his duty towards myriads of *Things* belonging to myriads of *Persons* other than that Individual. An *Infringer* can occupy no position analogous to either of the

two positions just stated. Where A is the holder of a *Right* all Individuals included in (non-A) cannot possibly be the *Infringers* of any particular *Right* of A. Similarly, one Individual W cannot possibly be the *Infringer* of all *Rights* held by all Individuals included in (non-W.)

68. The *Abstainer* is distinct from the *Spring* in the following respects. The first distinctive feature of the *Spring* is that the term denotes a definite Individual who by virtue of his own juristic act, assumes, to the extent of the act promised by him, the position of being the physical *source* of the *Thing*. The promisor as the *Spring* is invested with no juristic capacity. He is neither a component element of *Right* nor a constituent of *Duty*. To be an *Abstainer* is a juristic capacity whilst to be a *Spring* is the physical capacity, and the promisor minus the *Spring* constitutes the *Abstainer*. The promisor, it must be borne in mind, is the *Spring* only when he is actually performing his part of the contract.

When the promisor assumes the function of the *Spring* he, to the extent of the actual performance of his part of the contract, is the *Spring*, and to the extent of his *Abstinence* from interfering with his own act is the *Abstainer*. The *Subject matter* of *Duty* of the promisor therefore is not

the *doing* of the act he has promised to *do*, but the *Abstinence* from interfering with the *doing* of such act.

69. The distinction between the *Debitor ex contractu* and the *Spring* is clear enough. The former is a juristic capacity and precedes the latter in point of time, whilst the latter is a physical capacity and follows the former. The capacity of being the *Debitor ex contractu* ceases to exist as soon as the promisor begins to perform his part of the contract. The *Debitor ex contractu* may not himself be the *Spring*, for he may have promised that his delegate or slave would perform his part of the contract.

The *Debitor ex contractu* differs from the *Infringer* in many respects. A *Debitor ex contractu* need not be an *Infringer*. Similarly, an *Infringer* need not be a *Debitor ex contractu*. When a *Debitor ex contractu* happens to be an *Infringer*, he becomes an *Infringer* in consequence of some act of his which interferes with his being the physical *Spring of the Object of Right*. Previous to being a *Debitor ex contractu* no *Right* exists with reference to which he may be the *Debitor*; but previous to being an *Infringer* a *right* does exist.

70. The *Infringer* and the *Spring* are distinct from each other. The former has as we have stated (S. 63 et. seq.) a juris-

tic capacity, whilst the latter has, as we have stated (s. 68) a physical capacity. Although a definite activity of the *Spring* may be the component element of the *Right* held by the promisee, yet the *Spring* of such activity *himself* is no component element of either *Duty* or *Right*.

71. Having defined and distinguished the various capacities, the next step is to examine which of the capacities, we have defined and explained, may, and which of them may not, be combined in one and the same thing at one and the same time.

Thing and *Abstinence*, in our humble judgment, are such conceptions as cannot possibly be united in one object of thought simultaneously. There can be no thing or relation of things which, with reference to one Individual, is the *Object of Right* and which, at the same time, with reference to another Individual, is the *Subject matter of Duty*.

In those cases of *right in rem* in which *Thing* is a corporeal substance it is scarcely possible to imagine that such a *Thing* may be the *Subject matter of Duty* of the Individuals who are subject to a duty correlative to such *right in rem*. The *Subject matter of Duty* in such cases must be distinct from the corporeal thing, and the only *Subject matter of Duty* which is possible, in such cases, is

the *Abstinence* to be shown by all the Individuals in the world towards that corporeal thing. When A is the owner of a house the only *Duty* which can possibly be imposed upon all the Individuals included in (non-A) is the *Duty* to *abstain* from interference with enjoyment of the house.

It will also be conceded on all hands that when, in the case of *rights in rem* the *Object of Right* is incorporeal such as a rent charge or a *malikanah*, that incorporeal object of thought as a *Thing* cannot possibly be the *Subject matter of Duty* of any Individual who is under a duty correlative to that *Right*. No one, so far as we are aware, has ever alleged that when an incorporeal hereditament belongs to A the *Subject matter* of the correlative duty of any Individual is also the same hereditament. In this example like the preceding example the only possible *Subject matter of Duty* imposed on all Individuals in the world is to *abstain* from interfering with the full enjoyment of the incorporeal *Thing* by the *Person*.

72. So far there is no occasion for the co-existence of *Thing* and *Abstinence* in one object, at one and the same time. When, however, B promises to render a personal service for the benefit of A, and a *right in personam* ensues, there is an occasion for the union of the *Thing* and the

Subject matter of Duty in the personal service of B. One may say that the act promised by B with reference to A is the *Object* of *Right*, whilst that very act with reference to the promisor who is one of the *Abstainers* is the *Subject matter of Duty*.

73. To enable the reader to form a clear idea of the truth that *Thing* and *Abstinence* cannot co-exist we make the following three analyses of the *Co-operative correlation* resulting from the contract for personal service :—

I.

i.—The *Person*, namely, the promisee.

ii.—The *Thing*, namely, the personal service to be rendered by B, the promisor.

iii.—The *Abstainer*, namely, all Individuals included in (non-A) which term includes B who has as much to *abstain* from interfering with the full enjoyment of his personal service, by A, as the rest of (non-A) ; and

iv.—The *Subject matter of Duty* which is an *Abstinence* from interfering with the enjoyment by A of the personal service of B.

II.

i.—The *Person*, namely, the promisee.

ii.—The *Thing*, namely, the personal service to be rendered by B, the promisor.

iii.—The *Abstainer*, namely, all Individuals included in (non-A) which term includes B; and

iv.—The *Subject matter of Duty* which is of two kinds :—

(*a*) *Abstinence* from interference with A's full enjoyment of the service to be rendered by B, when Individuals included in (non-A) other than B are contemplated to be subject to Duty.

(*b*) *Performance* of the personal service, when B is comtemplated to be subject to Duty.

III.

i.—The *Person*, namely, the promisee A.

ii.—The *Thing*—which is said to be non-existent.

iii.—The *Person bound*; and

iv.—The *doing* of the act promised by B.

74. Analysis I is our own, and so far as we are aware no jurist has even suggested it. We venture to think that it is the only correct analysis which can be made of the *Co-operative correlation*.

Analysis II has neither been suggested nor adopted, within our limited knowledge, by any writer on Jurisprudence.

We have simply suggested it as a possible rival to the analysis we have ventured to adopt.

Analyses I and II differ from each other in the following respect. In analysis I the promisor B is included in the class denoted by the *Person bound*, and a uniform duty to *abstain* is imposed alike on all the Individuals included in that class. B minus the *Spring* (S. 46) is as much bound to *abstain* from interfering with the function of the *Spring* as every other Individual of the said class.

In analysis II B the promisor is included in 'the *Person bound* and a *Duty* is imposed upon him; but his *Duty* is not like the *Duty* of other Individuals of that class to *abstain* from interfering with the function of the *Spring*. His *Duty* instead of *Abstinence* is to *do* the act he has promised.

75. We are, however, unable to accept that the personal service of the promisor is the *Subject matter* of *Duty* of the promisor on the following grounds:—

(*a*) B's definite act by the operation of a juristic act of his, namely, the contract to which he is a party, becomes the *Object* of *Right* of A, and juristically is deemed to form part and parcel of the activity of A. Such being the case, the same definite act of B cannot, from a juristic point of view, be considered as belonging to B. For, such a view would

amount to the proposition that a particular *Thing* is, at one and the same time, the *Property* of two Individuals severally. Physically, no doubt, that definite act belongs to the activity of B; but B in this respect is neither a *Person* nor an *Abstainer*; but merely the *Spring* from which the *Thing* comes out.

It might be contended that one could regard the *doing* of the definite act to be the *Subject matter* of *Duty* of the promisor as well as the *Object of Right* of the promisee. So far as our limited knowledge goes, no one has, in the first place, made such a suggestion and the suggestion, in the next place, stands in need of inventing a *positive duty* for one Individual in the world, whilst we can afford to do without such an inconsistent invention.

(*b*) *Duty*, being a *relation* between an Individual and all the *Limited Freedoms* excepting his own, no act by such Individual can possibly form the *Subject matter* of his *duty*. For an act of an Individual forms part and parcel of *his* activity, and while an Individual is doing an act he can scarcely be regarded to be in an active *relation* with other *Limited Freedoms*. No doubt an Individual can have passive *relation* with all *Limited Freedoms* other than his, and such a passive *relation* is really the *Subject matter of Duty*. We might put the same idea in another form. *Duty* is

a *relation* between an Individual and *Things* belonging to Individuals other than himself. Such being the case, the *relation* between an Individual and a definite act of his, as such, can scarcely be deemed a *relation* between an Individual and a *Thing* belonging to another Individual. Hence the *doing* of an act cannot be *the Subject matter of Duty of* the *doer* of that act.

The above grounds establish that analysis I is correct, and that the *Subject matter of* Duty in *rights in rem* and *rights in personam* both is a passive *Abstinence* to be shown by all those who are *bound* including the promisor.

Analysis III is wrong for it reduces the number of the component elements of the *Co-operative correlation* to three. This subecjt is fully discussed in the latter part of this work. (S. 98, et seq.)

75-a. Let us observe, in passing, that *Duty* according to the view accepted by Austin and other eminent jurists can be negative only in the case in which *forbearance* is deemed to be a negative attitude of human conduct.

Austin's idea of forbearance, however, is as follows:—

"A forbearance is a determination of the will, *not* to do some given external act. Or (taking the notions which the term includes in a different order) a forbearance is the *not* doing some given external act, and the *not* doing is *in consequence* of dertemination of the *will*. The import of the term is therefore, double. As denoting the determination of the will, its import is positive. As

denoting the inaction which is consequent upon that determination, its import is negative.

"This double import should be marked and remembered. For mere inaction imports much less than *forbearance* or abstinence from action." —*Austin, Vol. I, p.* 377, *4th edition.*

"It follows from the nature of Volitions, that *forbearances from acts* are not willed, but intended.

"To *will*, is to wish or desire one of those bodily movements which immediately follow our desires of them. These movements are the only *acts*, properly so called. Consequently 'To will a forbearance' (or to will the absence, or negation of an act)' is a flat contradiction in terms.

"When I forbear from an act, I *will*. But I will an act *other* than that from which I forbear or abstain : And, knowing that the act which I will, excludes the act forborne I intend the forbearance. In other words, I contemplate the forbearance as a *consequence* of the act which I will ; or rather, as a necessary condition to the act which I will. For if I willed the act from which I forbear, I should not will (at this time) the act which I presently will.

"For example, it is my duty to come hither at seven o'clock. But instead of coming hither at seven o'clock I go to the play house at that hour, conscious that I ought to come hither. Now, in this case, my absence from this room is *intentional*. I know that my coming hither is inconsistent with my going thither ; that, if my legs brought me to the University, they would not carry me tional, to the Play house.

"If I forgot that I ought to come hither, my absence would not be inten but the effect of *negligence*."—*Austin, Vol. I, p.* 437, *4th edition.*

Having regard to the meaning given by Austin to forbearance, a duty to forbear can only be said to be negative when the negative import of forbearance is contemplated and the positive import thereof is ignored.

Since the immediate end of the imposition of duties may be gained by non-interference with the *Limited Freedoms* of others, we may well afford to ignore the internal positive import of forbearance, and may confine our attention to the negative import of forbearance.

76 We have dwelt upon the subject under discussion at some length and we crave the indulgence of the reader for the same. As the thesis is somewhat difficult we take the further liberty of repeating what has been said, in a different form.

It is conceded on all hands that the *Subject matter of Duty* of all the world in respect of a *right in rem* is *Abstinence.*

It is also conceded on all hands that the right of a promisee to the personal service of the promisor is a *right in rem* (98—c). Such being the case, the logical conclusion is that the *Subject matter of Duty* of the promisor, in respect of his own personal service, is also the *Abstinence* from interference with such service *being done*

To reject such a natural conclusion and to hold that the whole world, except one Individual, is *bound* to *abstain* from interference with the doing of an act; but that one Individual (the promisor) is *bound* to do that act, leads to an easily avoidable inconsistency.

Given the position that the promisor like any other Individual is bound to *abstain* from interfering with the doing of the defi-

nite act he promised, it would be useless as well as unsound to hold that the promisor, over and above his being under the duty to *abstain*, is also *bound* to do the act he promised. No purpose, in the first place, could be served by the additional positive *Duty*. For when the promisor *does* actually do the definite act as the *Spring* and *does* at the same time *abstain* from interference with his own act, the object which is intended to be achieved by the imposition of the positive duty to *do* is gained. Moreover, the imposition of a positive duty in addition to the negative duty to *abstain* leads to the conclusion that a contract imposes upon the promisor two duties, one of which is negative and the other positive, and this amounts to hold that a *Right* is correlative to two *Duties*.

If the doing of a definite act may be regarded as the *Subject matter of Duty* of *one* Individual in the world, the *Person bound* instead of connoting a class will *ex necessitate rei* connote one Individual only; for the doing of a definite act to which the holder of a *Right* is entitled cannot possibly be effected by a *class*. Moreover, the capacity of being the *Person bound* will, if the doing of an act is the *Subject matter of Duty*, be reduced to a temporary capacity, and we shall have to hold that all Individuals except *one* lie under a permanent *Duty* to *abstain*;

but that *one* Individual lies under a temporary *Duty* to *do* a definite act.

If the *Subject matter of Duty* denotes both a *passive Abstinence* by all the Individuals but *one* and an *active performance* by *one* Individual, there should be some term importing such two contradictory meanings, and standing in the position of a *genus* to those two *species* of *Duty*. We, however, fail to imagine any term which could be correlative to *Right*, and would, at the same time, cover the two contradictory states of being *active* and *passive*.

According to analysis I, we have to look upon the definite service to be rendered by the promisor as the function of the *Spring*; but according to analysis II, such definite service is considered to be the *Subject matter of Duty* of the promisor. Hence, under our analysis the promisee is clothed with three capacities which may co-exist with one another, namely, he is the *Debtor ex contractu*, the *Abstainer* and the *Spring* of the *Object of Right*; whilst under the second analysis two contradictory imports—the *doing* and the *not* doing—are assigned to *Duty*. In our humble judgment, however, to regard the promisor as the *Spring* is preferable to the use of *Duty* in the two contradictory *imports*.

What has been said concerning *Thing* and *Abstinence*, clearly shows that a definite act by a promisor which

forms the *Object* of *Right* of the promisee may, at the same time, be deemed to be the *Subject matter* of *Duty* of the promisor. But to regard that act as the *Subject matter* of *Duty* of the promisor leads to absurdities already pointed out. What has been said also shows that a general *Abstinence* which is the *Subject matter of Duty* of every *Person bound* may not be the *Object of Right* of any Individual.

77. The *Person bound*, the *Debitor ex contractu*, the *Spring of the Object of Right* and the *Infringer* may co-exist with one another simultaneously. For a *Natural Person* may, analytically speaking, occupy two, three or even four of the above capacities, at one and the same time, with reference to various juristic relations between the same parties.

In order to make the exposition of the thesis clear and numerically exact, we may imagine that in an island there are only two Individuals A and B who are in state of Co-operation; and that A independently of B kills a deer and acquires a *right in rem* therein; B under the above supposition has, juristically speaking, to *abstain* from interfering with A's full enjoyment of the game, and as such has the capacity of the *Person bound*. If we stop at this stage, and introduce no fresh juristic relation between A and B, the analysis of the *Co-operative correlation* already existing between A and B, with reference to the game, and without

contemplating *Infringement*, will disclose that A has *only* one juristic capacity, namely, he is the *Subject* of *Right*, the game being the *Object* of his *right in rem*. B likewise has *only* one juristic capacity, namely, he is the *Person bound* the *Subject matter* of his *Duty* being the *Abstinence* from interfering with the full enjoyment of the game by A.

We may next imagine that B does not abide by his *Duty* (*Abstinence*) and snatches a portion of the game from A without his consent. In consequence of the act done by B a new juristic relation between A and B, in addition to the already existing juristic relation between them, ensues. B, over and above being the *Person bound*, becomes the *Infringer*; and A, over and above being the *Subject of Right*, becomes the *Creditor ex delicto*.

The above illustration shows that one *Natural Person*, namely, B has, with reference to A, two distinct juristic capacities of being:—

i.—The *Person bound*; and

ii.—The *Infringer*.

We may imagine, thirdly, that B in the island, in question, gathers some fruit and agrees to sell it to B. Now the juristic relation of contract between A and B clothes each of them with fresh juristic capacities. By the operation of the contract

B becomes the *Debitor ex contractu*; and by the operation of the same contract the fruit agreed to be sold by B, should be deemed to be the property of A and not of B. Viewed in this light, B is the *Person bound* and his *Duty* is to *abstain* from interfering with the placing of the fruit into the possession of A, and with interfering with his enjoyment thereof, when so placed.

Imagine, again, that B as an honest fellow begins to *perform* his part of the contract. Such acts on his part turn him, to the extent of those acts, into the *physical Spring of the Object of Right.*

If matters stop here, and no fresh juristic relation between A and B takes place, B, analytically is :—

i. The *Debitor ex contractu* so far as the contract is executory :

ii. The *Person bound*, so far as the fruit sold by him is deemed to be the property of A : and,

iii. The *Spring of the Object of Right* so far as he is imagined to be actually engaged in performing his part of the contract.

With reference to the illustration under consideration, it must be carefully borne in mind that when B finishes the performance of his part of the contract, whereby A obtains posses-

sion of the fruit, the juristic relation of contract ceases to exist, and along with it the first and the third capacities of B also cease to exist.

We may imagine, fourthly, that B, instead of performing his part of the contract, as was the case in the third illustration, does partially perform the contract, and not intending to perform the rest, consumes a portion of the fruit himself. Such consumption on his part creates the juristic capacity of *Infringer*.

B, under this illustration becomes :—

i.—The *Debitor ex contractu* so far as the contract is not performed.

ii.—The *Person bound* so far as the fruit sold is deemed to be the property of A :

iii.—The *Spring of the Object* of *Right* so far as he is imagined to be actually engaged in performing his part of the contract; and,

iv.—The *Infringer* to the extent of the portion of the fruit consumed by him.

78. The silmultaneous co-existence of various capacities in one *Natural Person* is not limited to the juristic capacities, we have already discussed. Other two or more juristic capacities may be found united in one and the same *Natural Per-*

son, with reference to various juristic relations in which such *Natural Person* is placed.

For example, a *Natural Person* may accept a Trust. Such an acceptance on his part will invest him with the juristic capacity of *Trustee*. He may subsequently purchase a portion of the trust property for himself. Such a purchase on his part, will clothe him, in addition to his Trusteeship, with the *persona* of a *purchaser* from one point of view, and with the *persona* of a *vendor* from another. That *Natural Person* simultaneously is

i.—*Trustee* ;

ii.—*Purchaser* : and,

iii.—*Vendor*.

In fact there is not the least difficulty in finding, from analytical point of view, one and the same *Natural Person* combining in himself, simultaneously, various capacities. We may easily imagine Smith to be a Landlord, a Tenant, a Collector, a Magistrate, a Barrister, a President of the Municipal Board and many other *personæ*, at one and the same time.

79. Having premised so far, we now endeavour to show that the *Subject matter of Duty* of every Individual who is *bound* is a passive *Abstinence* and that the promisor is no exception to the rule, his duty towards the promisee being to *abstain* from interfering with his own act.

Rights with reference to the *Subject matter of Duty* correlative to thereto may be classified as:—

i.—*Rights in rem.*

ii.—*Rights in personam* in which Individuals other than the promisor are contemplated as subject to duty, and,

iii.—*Rights in personam* in which the promisor himself is contemplated as subject to duty.

In the case of *rights* in *rem* the *Subject matter of Duty* of every Individual who is *bound* towards such *rights* is admittedly a passive *Abstinence* and such *Abstinence* is the only possible *Subject matter* of *Duty*. Regarding *rights in rem* it is scarcely possible to imagine any act which might be deemed te be the *Subject matter* of *Duty* of any Individual *bound* towards such *rights*.

In the case of *rights in personam*, where Individuals other than the promisor are contemplated as the *Persons bound*, the *Subject matter of Duty* to which they are subject is nothing but the passive *Abstinence* which they are *bound* to show towards the full enjoyment of the *act* by the promisee.

The reason of the above proposition is that the *right* of the promisee to the *act* to be done by the promisor, against Individuals other than the promisor, is a *right in rem*, and such being the case, the correlative duty imposed upon such Individuals must be a *negative duty to abstain* from interfering with it.

For example, if a singer enters into a contract, for singing, with the manager of a theatre, the *right* of the manager to the singing against Individuals other than the singer is a *right in rem* (S. 54), and the only duty which is imposed upon Individuals other than the singer, is that they have to *abstain* from interference with the singing.

So far no difference of opinion concerning the *negative* nature of *Duty* can reasonably be feared. When, however, in the case of *rights in personam* the promisor himself is contemplated as the *Person bound*, his duty may be regarded either to *do* the act or to *abstain* from interference with the *doing* of that act,

English writers upon Jurisprudence, presumably, looking more to practical results than to analytical accuracy, hold that the *duty* of the promisor is to *do* the act. With profound respect due to those eminent writers upon Jurisprudence, we venture to think that the position taken up by them is, analytically, unsound, and that it is not the only way to obtain the practical result; namely, the performance of the contract.

The grounds which have led us to hold that the *Subject matter of Duty* of the promisor is a passive *Abstinence*, have already been set forth (S. 75).

80. Over and above the said grounds for holding that the *duty* of the promisor, analytically speaking, is *negative*, we may venture to offer the following.

To hold that the *duty* of the promisor is to *abstain* from interfering with the *doing* of the act saves us from assigning two contradictory *imports* to *Duty*, and brings about a uniformity in the conception of *Duty*.

When we hold that the *duty* of the promisor is to *abstain* from interfering with his act, we may hold that every *non-abstinence* is a *breach* of Duty. But if we were to hold that the *duty* of the *promisor* is to *do* a definite act we could not hold that every non-doing of the act is a *breach*; for only such *non-doing* is a *breach* as co-exists with *Infringement* by the promisor. Any other *non-doing* which may be the result of the act of God or of *Infringement* by any Individual other than the promisor is not a *breach*.

For instance, if we hold that the *Subject matter of duty* of the singer in question is to *abstain* from interfering with the singing, every *non-abstinence* by him, no matter how it takes place, is a *breach*; but if we were to hold that the singing itself is the duty of the singer, we could not hold that every *non-singing* is a *breach*; for only such *non-singing* as is the result of *Infringement* by the

singer himself is a *breach*, and a *non-singing* which is brought about by the act of God or by *Infringement* on the part of some Individual other than the singer, is not a *breach*.

When we hold that a general *Abstinence* from interfering with the full enjoyment of the *Thing* by the *Person*, is the *Subject matter of Duty* we can easily hold that any particular act, inconsistent with such enjoyment, is *Infringement*; but if we were to hold that a particular act is the *Subject matter of Duty* we should have to hold that a general *Abstinence* from that act amounts to *Infringement*. We, however, do not think that any jurist would regard a passive *Abstinence* as *Infringement*.

For example, if a passive *Abstinence* by the singer from interfering with his own singing is deemed to be the *Subject matter of* his *duty* towards the singing, any particular act by the singer which interferes with the singing would amount to *Infringement*. If we were, on the contrary, to hold that the singing is the *Subject matter* of the *duty* of the singer a mere *Abstinence* from that singing would amount to *Infringement*.

81. The union of the *Debitor ex contractu*, the *Abstainer*, and the *Spring* in the promisor, and the sameness of the practical result of a *breach* and of *non-doing*, so far as the promisee

is concerned, have, we venture to think, led to the confusion of ideas regarding the *Thing* and the *Abstinence.*

In common *parlance* we may say that the singer is *bound* to sing, we may also say that it is the *duty* of the singer to sing. The above sentences, it must, however, be borne in mind, simply give expression to the practical results of a contract. Those sentences are not, we must point out, intended to express the *Subject matter of Duty* of the promisor, with scientific exactness. Analytically speaking, the singer consists of the *Abstainer* and the *Spring.* That portion of the activity of the singer whereby he sings, renders him the *Spring*, and the remaining portion of the activity of that singer is, as it were, reserved for his being the *Person bound.*

In short a promisor with reference to his *performing* his part of the contract may be represented as follows:—

Promisor = Abstainer + Spring.

82. In the case of *rights in rem* it is evident from what we have stated (S. 97 et. seq.) that the *Subject matter of Duty* of the *Person bound* is to *abstain* from interfering with the *Object of Right.* Where B is the owner of a house, the house is the *Object of Right* and the *Subject matter of Duty* of the *Person bound* is to *abstain* from interfering with the full enjoyment of the house by B, and in this instance,

the *Object of Right* (the house) and the *Subject matter of Duty* (*Abstinence*) are so distinct that it is *scarcely* possible to mistake the one for the other.

In the case of *rights in personam*, when any one other than the *Debitor ex contractu*, is contemplated as the *Person bound*, the *Subject matter* of his *duty* is also the *Abstinence* to be shown by him, so that the *Subject of Right* may have the full enjoyment of the *Object of Right*. In this case the *Object of Right*, instead of being a corporeal thing is the personal service to be rendered by the *Debitor ex contractu* and the *Abstinence* by the *Person bound*, who is very different from the *Debitor*, is the *Subject matter of Duty* towards the specific service.

When, however, in the case of a *right* to personal service, the *Debitor*, *i. e.*, the person who has promised to perform that service, is himself contemplated, as the *Person bound*, the identity of the practical results leads to a mixing up of the *Person bound* with the *Spring* of the *Object of Right*, and of the *Object of Right* with the *Subject matter of Duty*.

83. Ordinarily, we say as has already been stated (S. 81) that the promisor is *bound* to do the act he promised to do, or that it is the *duty* of the promisor to do the act promised to be done by him. The above sentences express the practical result which is to be obtained,

and in those sentences we use the words '*bound*' and '*duty*' without any regard to their proper and juristic sense.

To repeat shortly what has been fully stated we may say that the promisor as a *performer* of the act promised by him is not the *Person bound*; but the *Spring* of the *Object of Right* and, as a *Person bound*, he is the *Abstainer* from interfering with the *performance* of the promised act. The act, by the operation of the agreement, forms part of the *Limited Freedom* of the promisee, and when the promisor performs it, he, in the capacity of the *performer*, is the *Spring of the Object of Right*; and, in the capacity of the *Abstainer* from interference with the *performance*, is the *Person bound*. As the doing of an act is the *active* phase of his conduct, and the *Abstinence* from interference is the *passive* phase of that conduct, they co-exist with each other and a *Natural person* is, at one and the same time, the *active Spring* of the *Object of Right* as well as the *passive Abstainer*. One *Natural Person* may, analytically speaking, have two juristic capacities. For example, a Trustee, who purchases the property of his beneficiary, has simultaneously two distinct juristic capacities, *viz.*, that of the purchaser and of the vendor at the same time, although *physically* he is one Individual only. Similarly, in the case under consideration, the two capacities, *viz.*, that, of the *Spring of the Object of Right* and the *Person bound*, are united in the same Individual.

Such being the case, the physical identity of an Individual should not destroy his juristic duality, as a vendor and a purchaser, or as the *Spring of the Object of Right* and the *Person bound*.

If duty imports both an *active* and a *passive* meaning, there should be some term to denote these two distinct classes of Duty; but I fail to imagine any term, which could be a correlative of *Right*, and would at the same time, cover the two contradictory conceptions, *viz.*, *the doing* and the *not doing* of a thing. Moreover if the analytical distinction between the *Object of Right* and the *Subject matter of Duty* is ignored, and both of them are considered to be fused into one thing, the result is that one of the two terms of the *relation* called *Right* or of the *relation* called *Duty* disappears, and along with it that relation itself ceases to exist. The analytical distinction, between the *Object of Right* and the *Subject matter of Duty*, becomes prominent, when the acts promised are rendered *impossible*, either by the act of God, or by the act of the party. Although the practical result, so far as the non-performance, and the promisee are concerned, is exactly the same in both cases, the promisor in the former case is not a wrong-doer, but in the latter case he is. When the acts promised to be done are not done, because of the act of God, the *Spring of the Object* of *Right* is, as it were dried up, and the *Object of Right*, without *Infringement* on the part of the promisor,

ceases to exist. When the promised acts are not performed as a result of *non-abstinence* from interference by the promisor, he, as a *Person bound* infringes his *Duty* of being passive; and is, therefore, a wrong-doer. Without the analytical separation of the *Object of Right* from the *Subject matter of Duty* the distinction between these two cases of non-performance is not possible.

A special feature of *Duty* as a passive *Abstinence* is that it co-exists with the carrying on of the life-sustaining acts, and does, in no way, interfere with them. Active duties, on the other hand, must interfere with the enjoyment of some *rights*, and must to that extent be injurious to life.

CHAPTER VIII.

CORRELATION OF RIGHT AND DUTY

84. *Right* and *Duty* are, and have been said to be, correlative.

The following passages show that *Right* and *Duty* are deemed to be correlative :—

"A monarch or sovereign body expressly or tacitly *commands*, that one or more of its subjects shall do or forbear from acts, towards, or in respect of, a distinct and *determinate* party. The person or persons who are to do or forbear from these acts are said to be subject to a *duty*, or to lie under a duty. The party *towards* whom those acts are tobe done or for borne, is said to have a right, or to be invested with a right. Consequently the term 'right' and the term '*relative*

duty' are correlating expressions. They signify the same notions, considered from different aspects, or taken in different series. The acts or forbearances which are expressly or tacitly enjoined, are the objects of the rights as well as of the corresponding duty. But with reference to the person or persons commanded to do or forbear, a duty is imposed. With reference to the opposite party, a right is conferred."—*Austin, Vol.* I, *page* 412, *4th edition.*

'Every right whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right. Wherever any one is entitled to such furtherance on the part of others, such furtherence on their part is said to be their 'duty.' Where such furtherance is merely expected by the public opinion of the society in which they live, it is their 'moral duty.' Where it will be enforced by the power of the State to which they are amenable, it is their legal 'duty.'

'The correlative of might is necessity, or susceptibility to force; of moral right, is moral duty; of legal right is legal duty. These pairs of correlative terms express, it will be observed in each case, the same state of facts viewed from opposite sides. A state of facts in which a man has within himself the physical force to compel another to obey him, may be described either by saying that A has the might to control B or that B is under a necessity of Submitting to A. So when public opinion would approve of A commanding and of B obeying, the position may be described either by saying that A has a moral right to command, or that B is under a moral duty to obey. Similarly, when the State will compel B to carry out either by act or forbearance the wishes of A, we may indifferently say that A has a legal right or that B is under a legal duty."—*Holland, on Jurisprudence, pages* 73—74, *4th edition.*

85. Having quoted the passages showing that *Right* and *Duty* are correlative let us see what their correlation means. No doubt they are correlative, in the sense that there is a mutual relation between them, and that the idea of each of them calls up

the idea of the other. They are also correlative in the sense that whenever a *Duty* is imposed upon some one it cannot be imposed unless there is some Individual who is entitled to a *Right*, and for whose benefit the *Duty* is imposed. To talk of absolute duties, which have no corresponding *Rights*, is inconsistent with the nature of the two correlative terms The so-called *duty* to forbear from cruelty to lower animals cannot be regarded as a *Duty*, unless there is some one who is entitled to an *Abstinence* from such cruelty. Similarly, if it is our *duty* to revere God there is a corresponding *right* in Him to be revered.

Beyond the two senses, already noticed, there is no correlation between *Right* and *Duty* in any other sense. Nothing like the correlation of energy can be attributed to them. Nor are they correlative in the sense that "they signify the same notions considered from different aspects" or that they "express the same state of facts viewed from opposite sides." A state of facts in which the State will compel B to carry out, by act or forbearance, the wishes of A warrants us, no doubt, to say either that A has a legal *Right*, or that B is under a legal *Duty*. This circumstance, however, is not sufficient to enable us to hold that *Right* and *Duty* express the same state of facts looked at from opposite sides.

A concrete example will perhaps make our meaning clear. Where Smith is the owner of a house, and the State recognises

his *right in rem* to the house, and imposes a *duty* upon the rest of its units to *abstain* from interfering with the exercise, by Smith, of proprietary rights over the house, Smith has a legal *right in rem* to the house, and the rest of the units of the State are, under a legal *duty*, to *abstain* from interfering with his full enjoyment of the house. But we cannot conceive of any definite state of facts which would be a legal *right* from the point of view of Smith, and could, at the same time, be the legal *duty* from the point of view of the rest of the units of the State. It seems to us that the mixing up of the *Object of Right* with the *Subject matter of Duty*, when a personal service, of a promisor is the *Object* of *Right* of the promisee, has led to such a conclusion.

The example just given shows clearly that in the case of *rights in rem* the *Abstinence* which is the *Subject matter of Duty* imposed upon the *Persons bound* cannot possibly be identical with the *Object of Right* belonging to the *Subject of Right*.

CHAPTER IX.

CRITICISM OF DR. HOLLAND'S DEFINITION OF RIGHT.

86. Having set forth our own ideas regarding the genesis, evolution, definition, analysis, and classification of *Right* and *Duty*, we have to examine what has been said by some eminent English

Jurists regarding the definition, analysis and classification of *Right.*

Dr. Holland has defined *Legal Right* in the following terms :—

"Jurisprudence is specifically only concerned with such rights as are recognised by law and enforced by the power of a State. We may, therefore, define a legal right in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others."—*Holland, p.* 70, *4th edition.*

The definition of *Legal Right* given by Dr. Holland seems to be an improved form of the definition given by Austin "right—the capacity or power of exacting from another or others acts or forbearances, is nearest to a true definition."

After defining *Legal Right* Dr. Holland has analysed it and the passages bearing on the subject of analysis are as follow :—

"We have seen that a 'moral right' implies the existence of certain circumstances, with reference to which a certain course of action is viewed with general approbation, and the contrary course with disapprobation ; that a legal right exists where the one course of action is enforced, and the other prohibited, by that organized society which is called 'the State.'

"We have next to consider more particularly what is the character of those elements from which a right results. They are :—(1) A person 'in whom the right resides', or who is clothed with the right, or who is benefited by its existence. (2) In many cases, an object over which the right is exercised. (3) Acts or forbearances which the person in whom the right resides is entitled to exact. (4) A person from whom these acts or forbearances can be exacted ; in other words, against whom the right is available ; in other words, whose duty is to act or forbear for the benefit of the subject of the right.

"The series of elements into which a right may be resolved is therefore :—

The Persons entitled.	The Object.	The Act or Forbearance.	The Person obliged.

"It will be observed that the first and the last terms of the series are a person. The second term is the object of the right (whether it be a physical thing, or what the law chooses to treat as such) if any (for there exists large classes of rights which have reference to no object, either physical or assimilated to such); and the third term is made up of the acts or forbearances to which the person in the fourth term is bound. It will be convenient to call the person entitled 'the person of inherence'; and the person obliged, 'the person of incidence.' The intermediate terms may be shortly referred to as 'the object,' and 'the act,' respectively.

That this series is no technical abstraction but a simple formula for the representation of the indisputable elements of right may be more apparent from an example. A testator leaves to his daughter a silver tea-service. Here the daughter is the 'person of inherence,' *i. e.*. in whom the right resides; the tea-service is the 'object,' of the right, the delivery to her of the tea-service, is the 'act,' to which her right entitles her; and the executor is the 'person of incidence'; *i. e*, the person against whom her right is available. Or take an example of a right where, as we stated to be often the case, the second term of the series is wanting. A is B's servant. Here B is the 'person of inherence,' reasonable service is the 'act' to which he is entitled and A is the 'person of incidence' against whom the right is available. The nature of the right varies with a variation in any one of the four terms which are implied in it, and the variation in the nature of the right gives rise to the main heads or departments of law."– *Holland on Jurisprudence pp* 77-78, *4th edition*.

87. The definition of *Legal Right* given by Dr. Holland calls for the following remarks :—

The definition does not specify those acts of others, in respect of which, the *Subject of Right* who is the person entitled, has a capacity to regulate the acts of others with the assistance of the State. The definition has been couched in terms wide

enough to include the regulation of all the voluntary acts of others. Certainly such a *capacity* cannot possibly be an incident of any *Legal Right* of any Individual. If any Individual has a *capacity* to regulate the life-sustaining acts of other Individuals, which they might perform for the maintenance of their lives, such a *capacity* is no possible incident of his *Legal Rights*. It is rather an incident of his power to violate his own *Duty*. If Smith has a *capacity* to regulate the acts of others, with the help of the State, so as to lay down, for them, rules as to what and how much they should eat, as to when and how long they should sleep, as to how and what professions they should follow and, in short, as to how they should exercise their *Limited Freedoms*, such a *capacity* cannot possibly be deemed an incident of Smith's *Legal Rights*. Correctly speaking, it is a gross, and unpardonable violation of his *Duty* towards others.

The *capacity* in order to be an incident of *Legal Rights* must be a *capacity* to regulate such acts as may amount to *Infringement* of '*Legal Rights*.' No *capacity* to regulate the acts of others, save the limited *capacity* to regulate such acts of others as amount to *Infringement* of *Legal Rights*, can be an incident of such *Rights*.

The definition is silent as to the *Object of Right*, with reference to which the *capacity* exists. The highest *capacity* to regulate

all the voluntary acts of the human race, without any reference to some *Object of Right*, indeed, is no incident of *Legal Rights*. In order to be an incident of *Legal Rights*, the *capacity* to regulate must, therefore, have reference to some *Object of Right*. A mere reference to some *Object of Right* is not enough. Such *Object* must be the *Object of Right* of the Individual who has the *capacity*. If Smith has a *capacity* to regulate the acts of others with reference to the *Object of Right* belonging to John, such a *capacity* is no incident of Smith's *Legal Rights*.

The definition makes no allusion to the proximate end for which the acts of *Infringement* by others are to be regulated. That proximate end, as may easily be inferred from what we have stated in the preceding pages, is the quiet enjoyment of the *Object of Right* by the *Subject of Right*. If Smith has a *capacity* to regulate the acts of others, not for the purpose of having the freedom to enjoy the Objects of *Right*, belonging to him, but for some other purpose, say for the purpose of having those *Objects of Right* taken away from him, such a *capacity* cannot be an incident of his *Legal Rights*.

The definition of *Legal Right*, moreover, ignores the ultimate end to which all *Rights* and *Duties* owe their origin, and without reference to which the existence and non-existence of *Rights* and *Duties* are alike. If an Individual has a *capacity* to regulate the

movements of the whole world, to no purpose, such *capacity*, in the eye of the law, is useless. Similarly, if he has a *capacity* to regulate the acts of all Individuals for some purpose other than the preservation of life, both individual and collective, in a *Physico social Environment*, his *capacity* may be anything, you may choose to call it, but certainly it is not an incident of his *Legal Rights*. If B, therefore, by some miraculous power, can make all living persons silent, for a second, on a particular day, for no purpose, connected with the preservation of life, such a *capacity* is no incident of his *Legal Rights*.

The reasons given in the preceding portion of the section make it clear that a *capacity* to regulate the acts of others, in order to be imported into the definition of *Legal Right*, stands in need of several limitations. It must be a *capacity* to regulate such acts only as amount to *Infringement* of *Legal Rights*. It must be a *capacity* with reference to such *Infringement* as is directed towards the *Legal Rights* of the *Person* in whom the *capacity* resides. The proximate end of the *capacity* must be the quiet enjoyment of the *Object of Right* by the *Subject of Right* to whom it belongs. The ultimate end of the *capacity* must be the preservation of life, both individual and collective, in a *Physico-social Environment*.

88. The addition of all the needful limitations, we have just enumerated (S. 87), cannot possibly turn the *capacity* into a

Legal Right. The capacity still remains an incident of *Legal Rights.*

The function of the State is, first, to define *Legal Rights* and secondly, to protect them. The mere definition by the State of *Legal Rights* creates no *capacity* in any Individual to regulate the acts of *Infringement* of those *Rights* by others. It is the undertaking, on the part of the State, to protect the *Rights* defined by it, which invests an Individual with a *capacity* to regulate such acts of other Individuals as amount to an *Infringement of his Legal Rights.* The *capacity* to regulate the acts of others, therefore, inasmuch as it is *creature* of the undertaking on the part of the State to protect the *Legal Rights,* can form no essential element of a *Legal Right* which is the result of the definition made by the State. The advantage attending the *capacity* is that, when a *Legal Right* is, or is in danger of being, infringed, the Individual, who has the *capacity,* can proceed according to the *Adjective law,* for the protection of such *Right.* Such being the case, we fail to see how a capacity to put the (Adjective) law in motion, for the protection of a *Legal Right,* could be deemed the *Legal Right* itself. Such a *capacity* simply serves as a means of following the procedure, specified by the State, for the protection of *Rights* and enforcement of remedies. When Procedure itself

is a means for the protection of *Legal Rights*, a capacity to move the State through that Procedure cannot be identical with a *Legal Right*. It often happens that a *Legal Right* is infringed, and the aggrieved party by virtue of the *capacity* created, in his favour, by the State, seeks the remedy; but in consequence of some technical flaw in the procedure, notwithstanding the Infringement which actually took place, the plaintiff's suit is dismissed. Can such a disastrous consequence of the *capacity* be identified with that *Legal Right?* It also happens that a *Legal Right* is infringed whereby the holder of such *Right* is ruined for life; but he gets, as a recompense, if successful at all, a paltry sum of money. Such money may, in the eye of the Law, be deemed to be a proper substitute for the original *Object of Right*; but it cannot be considered as identical with such *Object of Right*.

89. The *relation* among the *Subject of Right*, the *Person bound* and the *State* with reference to a *capacity* to regulate such acts of others as amount to *Infringement* of the *Legal Rights* of the *Person* who has such capacity, is more complex than the *relation* called *Right*. The former *relation* when analysed, yields the following six elements :—

i.—The *Subject of Right* who has the *capacity* to move the State:

ii.—The *Object of Right* for the protection of which the *capacity* is given by the State to the *Person* :

iii.—Thd *Person bound:*

iv.—The *Abstinence* from *Infringement:*

v.—The State which undertakes to protect the *Legal Rights*: and,

vi.—The protection by the State against *Infringement.*

Viewed in this light, the *capacity* to regulate such acts of others as amount to *Infringement* of the *Legal Rights* of the Individual in whom such capacity resides, can be no incident of a *Legal Right.* Such capacity is an incident of the *Co-operative correlation* with reference to *Infringement.* The end aimed at by the creation of such *capacity* is the protection of *Legal Rights* with which it is not identical.

90. If acceptance of ready made definitions, based upon a disinclination to independent thinking, induces any body to have the *capacity* introduced into the definition of a *Legal Right,* he may define it in the following terms: *A Legal Right is a definite relation between an Individual and his Limited Freedom, defined and protected by the State, for the preservation of life, both individual and collective, in a Physico-social Environment, a political incident of the State protection being a capacity in the Individual entitled to the Right to regulate such actions of others as may infringe his Rights.*

The probable cause of making a *Legal Right* identical with the *capacity* to regulate the actions of others with the State

assistance, seems to be the notion that *Legal Rights* are the *creatures* of the State, and that they have no independent reality which is *recognised* by the State.

Another reason for defining a *Legal Right* "as a *capacity* residing in one man of controlling, with the assent and assistance of the State, the actions of others," without the least reference to the *Object of Right*, for the enjoyment or protection of which such capacity is created, seems to be a desire to frame a definition, which would include *rights in personam*. In such rights the *Subject matter* of the duty of the promisor is deemed by those framers to *do* the act promised by him, and the *Subject of Right* is considered by them to be entitled to certain acts *only*, which he may compel the promisor to do, with the help of the State. The framers of the definition of *Legal Right*, however, in attempting to include *rights in personam* in the definition, seem to have entirely lost sight of *rights in rem*, in which the *Subject of Right* is in *possession* or *quasi possession* of the *Object of Right* and can enjoy it without standing in immediate need of invoking the help of the State.

The second reason suggested by me for making the *capacity* identical with a Legal Right receives support from the following passage in Austin :—

"It may, indeed, be said, that a man has a power over a thing or person, when he can deal with it according to his pleasure, free from obs-

obstacles opposed by others. Now in consequence of the duties imposed upon others, he is thus able. And in that sense a right may be styled a power. But even in this case, the definition will only apply to certain rights to *forbearance*. In the case of a right to an *act* the party entitled has not always (or often) a power.—*Austin on Jurisprudence, Lec. XVI, p. 410 4th ed.*

With feelings of deep respect to the eminent writer upon Jurisprudence, we are unable to accept the position that the *Subject* of *Right* (S. 52) has a power over the *Object of Right* (S. 52) in the case of a *right in rem* (S. 54), but that there is no power in the *Subject of Right* over the *Object of Right* in the case of a *right in personam*. The operation of the agreement, we venture to submit, confers a power upon the promisee to control the promisor, to the extent of the *act* promised by him, and such *act* with reference to the control thereupon is analogous to the house to which the *Subject of Right* is entitled. If there is any difference in Jurisprudence between a *house* and an *act*, when either of them is the *Object of Right*, that difference may be concerning the nature of those two things; but the nature of *control* in both cases is the same.

The expression 'the capacity to regulate the actions of others etc,' itself indicates that the *Person* who has the capacity to invoke the help of the State has a juristic relation of *control* over certain activities of other individuals, and when

they do not *do* the acts over which the promisee has a control, he can ask the State to help him, or rather to oblige the promisor to do what he has to do under the contract.

A promisor often performs his part of the contract without the intervention of the State, and if the promisee has no juristic relation of *control* over that act, there is no reason why the promisor should take the trouble of performing his part of the contract

Dr. Markby in his Elements of Law presumably on the basis of the passage just quoted from Austin says :—

"A right has sometimes been described as a faculty or power of doing or not doing. A faculty or power of doing is undoubtedly the result of some rights, for instance, the right of ownership enables us to deal with our property as we like, because others are obliged to abstain from interfering with our doing so. But we can hardly, I think, identify the right with this faculty or power. —*Markby page* 91.

If a faculty or power of doing an act can hardly be identified with Right, the capacity of controlling the actions of others which, in our humble judgment, is a *particular* kind of power of doing an act, can not also be identified with Right.

CHAPTER X.

CRITICISM OF DR. HOLLAND'S ANALYSIS OF RIGHT.

91. The substitution of a vague description of *Legal Right* for an exact definition thereof may account for the erroneous

analysis of *Right*. As has been shown, by us (S. 39) *Right*, as a *relation*, is resolvable into two elements only, *viz*, the *Subject of Right* and the *Object of Right*, but the introduction of the idea of *capacity* to regulate the actions of others, involves the idea of *Infringement*, and naturally brings in the idea of the *Person bound* and of *Abstinence*. The result of the introduction of the above two elements is that *Right* appears to consist of four elements.

In fact the four elements into which *Right* has been analysed by Dr. Holland are not the elements into which *Right alone* is resolvable. Those four elements are the component elements of the *Co-operative correlation* which has for its components *Right*, on the one hand, and *Duty* on the other, each of the two in its turn being resolvable into two elements.

The above analysis of *Right* into four *elements*, besides being really the analysis of the *Co-operative correlation*, which may be broken up into *Right* and *Duty*, has no reference to the *capacity* to regulate. If we take into consideration the *capacity* to regulate also, the *correlation* which we have to analyse grows more complex, and the four elements, already stated, are not enough to constitute it. Over and above the *Subject of Right*, the *Object of Right*, the *Person bound* and *Abstinence*, the ideas of the *State*, and the *protection* by it are needed to

constitute the complex *correlation* in question. In this view the *correlation* consists of the following six elements:—

(1) Subject of Right.

(2) Object of Right.

(3) Person bound.

(4) Abstinence.

(5) State.

(6) Protection by the State.

92. Another important point regarding the analysis of *Right* is worth noticing. According to our humble view Right is a *relation* between two objects of thought only (S. 39); namely, a *Person* (S. 52) and a *Thing* (S 52), wherefore *Right* cannot possibly exist unless both the *Person* and the *Thing* which are related have existed.

The existence of an unrelated *Person* is not enough; for if it were so, the juristic *relation* '*Right*' would become identical with one of the two related elements. Mereover, if an unrelated *Person* were enough to constitute *Right* there would be no *Object of Right* with reference to which he would stand in need of regulating the actions of others. Again, if an *Object* of *Right* is not an essential component of every *Right* there is no reason why the *Subject of Right* is an essential, and a *Right* may therefore be deemed to exist when either the *Subject of*

Right or the *Object of Right* exists. We need, however, scarcely remark that such conclusions are apt to reduce Jurisprudence to a jumble of absurdities. In short, *the existence of both a Person and a Thing is a condition precedent to the existence of a Right, and a mere existence of the two is not enough: they must also be related to each other.*

For reasons akin to those we have just set forth we should expect those who analyse *Right* into four elements, to hold, that *Right* is invariably resolvable into the same number (four) of elements. Such, anyhow, is not the case. Dr. Holland referring to the elements of Right observes:—

"Sometimes it (right) has reference to a tangible object. Sometimes it has no such reference. Thus, on the one hand, the ownership of land is a power residing in the land-owner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject and exercised over his child as its object available against all the world besides. On the other hand, a servant has a power residing in himself as its subject availabe against his master to compel the payment of the wages which are due to him."—*Holland p*, 70. *4th edition.*

In another place (p. 78) the same author says:—

"Or take an example of a right where, as we stated to be the case, the second term of the series is wanting.

"A is B's servant. Here B is the 'person of inherence,' reasonable service is the 'act' to which he is entitled, and A is the 'person of incidence,' against whom the right is available."

If the passages be taken to mean that the *corpus* over which a *Right* is often to be exercised is 'wanting,' they are correct; but if they mean, as seems to be the case, that in many instances the *Object of Right* itself is wanting, and that the analysis of some *Rights* yields *only* three elements, then, with due deference to the learned jurist we submit that the position taken up by him is wrong.

To hold that the analysis of *Right* sometimes yields four elements, and at other times only three, is analogous to the proposition that a chemical compound, sometimes, is made up of four elements, and at other times, of three only, or, to the proposition that a sentence sometimes consists of a subject, a predicate, and a copula, and at other times, of a subject and a predicate only. If there are some *Rights* which consist of four elements and other *Rights* which consist of three elements only, the two kinds of *Right* cannot be the subdivisions of the one and the same *species*.

93. The fact is that, according to the analysis of *Right*, made by Dr. Holland, every *Right*, be it a *right in rem* or a *right in personam*, always consists of four elements; but, as in many cases, the second element, *viz.*, the *Object of Right* is wanting *in corpus*, the absence thereof has been mistaken for the absence of the second element, namely, the *Object of Right* itself.

In such instances of *right in rem*, as have a corporeal thing

for the *Object of Right*, the presence of the second element, namely, the *Object of Right* is evident, and Dr. Holland himself has, in the passage already quoted (S. 92), admitted the presence of it.

In those cases of *right in rem* in which the *Object* of *Right* happens to be intangible, such as a *malikana*, a copy right, or a good will, the *Object of Right* is simply wanting *in corpus*. Such want of corpus must not however be deemed to amount to the extinction of the intangible *Object of Right*; for the intangible *Object of Right* has such an existence as is sufficient for juristic purposes. A *malikana* may, for instance, be the object of ownership and may also be fit subject matter for transfer or inheritence. To consider therefore the intangible *Objects of Right* as non-existent is decidedly wrong.

In the case of *rights in personam* also the *Object* of *Right* has, for the purposes of Jurisprudence, as good an existence as any corporeal thing. It is, however, always intangible, if acts are deemed to be intangible. The act, which the promisor has to perform for the benefit of the promisee, is the *Object of Right* of the promisee. The promisor, from this point of view, has two distinct capacities. As the performer of the act agreed upon, he is the *Spring* of the *Object of Right*, and as the *abstainer* from interfering with the promised act being done, he is one of

the *Persons bound* upon whom, as such, the *Duty* to *abstain* lies. The *Subject matter of Duty* of the promisor like that of any other *Person bound* is *Abstinence* and is therefore very distinct from the act agreed upon, which is the *Object of Right* of the promisee. Analytically, the *Subject matter of Duty* is as distinct from the *Object of Right* in this case, as *Abstinence* from trespassing upon a house is from the house when that house forms the *Object of Right* of some person.

94. The passage quoted from Dr. Holland (S. 92) seems to show that the *Object* of *Right* is wanting in the case of a *right in personam.* Austin, however, holds that there are *rights in rem* which are not rights over (determinate) persons or things, but rights to forbearances merely.

"Having cited examples of real rights which are rights over persons, I will cite an example or two of *real* rights, which are *not* rights over things or persons, but are rights to *forbearances* merely.

"1. A man's right or interest in his *good name* is a right which avails against persons, as considered generally and indeterminately; they are bound to *forbear* from such imputations against him as would amount to *injuries* towards his right in his reputation. But, though the right is a *real* right, there is no subject, thing or person, over which it can be said to exist. If the right has any subject, its subject consists of the contingent advantages which he may possibly derive from the approbation of others.

"2. A monopoly, or the right of selling exclusively commodities of a given class, (a patent right for instance,) is also a *real right*: All persons, other than the party in whom the right resides, are bound to *forbear* from selling commodities of the given class or description. But,

though the right is a *real* right, there is no subject, person or thing, over which it can be said to exist. If the right has any subject, its subject consists of the future profits, above the average rate, which he may possibly derive from his exclusive right to sell.

"3. Many more examples of this class of rights might be selected from among *Franchises*; a law term embracing an immense variety of rights, having no common property whatever except their supposed origin, being all of them considered to have been originally granted by the Crown. Such, for example, is a right of exclusive jurisdiction in a given territory, or a right of levying a toll at a certain bridge or ferry. The law in these cases empowers a party to do certain acts, and enjoins all other persons to forbear from every act which would defeat the purpose of the right. But these rights are not exercised over any determinate subject, and are yet available against the world at large The rights *in personam* which concur with the rights in question are perfectly distinct from those rights themselves. Those who reside within the territory, or who traverse the bridge, are bound by obligations, arising out of the franchise; but these obligations, which result from their peculiar position, and which answer to rights in *personam*, are distinct from the obligation incumbent upon third parties, and answering to the right *in rem*: namely, the obligation not to impede the exercise of the jurisdiction, the levying of the toll, or the passage over the bridge; nor to carry passengers across within the limits of the ferry, to the detriment of the exclusive right of the person entitled.

"4. Lastly, a right in a *status* or condition (considered as an aggregate of rights and capacities) is also a real right."—*Austin on Jurisprudence. Lec XV. p.* 400 4th *ed.*

"Accordingly, some rights in rem are rights over *things*: others are rights over *persons*: whilst others have *no* subjects (persons or things)

over or to which we can say they exist, or in which we can say they inhere:—For example: Property in a horse, property in a quantity of corn, or property in or a right of way through a field, is a right *in rem* over or to a *thing*, a right *in rem* inhering in a *thing* or a right *in rem* whereof the subject is a *thing*.—The right of the master, against third parties, to his slaves, servant, or apprentice, is a right *in rem* over or to a *person*. It is a right residing in one person, and inhering in another person as its subject. The right styled monopoly a is right *in rem* which has *no* subject. There is no specific subject (person or thing) over or to which the right exists, or in which the right inheres. The *officium* or common duty to which the right corresponds, is a duty lying on the world at large, to forbear from selling commodities of a given description or class: but it is not a duty lying on the world at large, to forbear from acts regarding determinately a specifically determined subject. A man's right or interest in his reputation or good name, with a multitude of rights which I am compelled to pass in silence, would also be found, on analysis, to avail against the world at large, and yet to be wanting in persons and things which it were possible to style to their subjects.

"I shall therefore distinguish right *in rem* (their answering relative duties being implied) with reference to differences between their *subjects*, or between the aspects of the forbearances which may be styled their *objects*. As distinguished with reference to those differences, they will fall (as I have intimated already) into three classes.—1. Rights *in rem* of which the subjects are things, or of which the objects are such forbearances as determinately regard specifically determined things. 2. Rights *in rem* of which the subjects are persons, or of which the objects are such forbearances as determinately regard specifically determined persons. 3. Rights *in rem* without specific subjects, or of which the objects are such forbearances as have no specific regard to specific things or persons."—*Austin on Jurisprudence, p.* 48. *Vol. I, 4th ed.*

If Austin means, and in our humble judgment he does mean, that there are certain *rights in rem* in which there is no determinate *Object of Right*, then, with profound respect due to the learned writer, we are unable to agree with him. Wherever there is a *Right* there must also be something which is the *Object* of that *Right* and which is determinate. The reason is that a *Right* cannot be conceived as existing without the existence of an *Object of Right*, that a thing which is *not determinate* is unfit to be related as the *Object of Right*, and that a thing as soon as it forms one of the two related components of *Right* becomes determinate as a matter of course. Moreover, the statement that an indeterminate thing may be the *Object* of *Right* is akin to the statement that an indeterminate thing may be the subject matter of sale. We may further point out that an indeterminate thing cannot possibly be conducive to the preservation of life. Therefore such a thing is not fit to be taken notice of in Jurisprudence, as forming one of the component elements of *Right*. In the case of *rights* to monopoly, franchises, reputation or status, the *Object* of *Right* seems to have been regarded by Austin as *non-determinate*. Such a view, in our humble judgment, is erroneous. For the purposes of jurisprudence all the above *things* are as determinate as a *specific* house, or a *particular* watch. Had those things been

non-determinate they could not have been fit to be the subject matters of juristic transactions. Nobody could have granted monopolies or franchises: nobody could have transferred them: nobody could have inherited them. A specific monopoly or franchise is definitely distinguishable from any other monopoly or franchise, and such a distinction without being determinate is an impossibility. In fact we fail to see in what respect can a specific monopoly, franchise, reputation or status be considered as *non-determinate*. No doubt the above things have no *corpus*; but the absence of *corpus* cannot amount to the *extinction* of those things or to their being *indeterminate*.

A *Juristic Person* has no *corpus*, but nobody, so far as we are aware, has on that account stated that in some cases of Right the *Juristic Person* who is the holder of such Right and who happens to have no *corpus* is *wanting*.

According to the views propounded by Austin himself rights to monopolies, franchises, reputation or status are not the only *rights in rem* which are 'rights to *forbearances* merely.' All *rights in rem*, as they impose a negative duty, are rights to *forbearances* merely. Such being the case, the fact of having a right to forbearances merely, is not a distinctive feature of rights to monopoly, franchises, reputa-

tion or status. The only distinctive feature of such Rights is that the *Object of Right* in them is wanting in *corpus*.

If we take into consideration the *import* which we have ventured to assign to the *Subject matter of Duty*. all rights whether they are *rights in rem* or *rights in personam*, are rights to forbearances with reference to the *Object of Right*.

Austin may be taken to mean that in the case of rights to monopoly, franchises, reputation or status the one and the same thing namely 'forbearances' are the *Objects of Right* of the holder of such rights as well as the *Subject matter* of *Duty* of all the *Persons bound*. The following passages from Austin, however, leave no room for the above interpretation :—

"1st.—External acts and forbearances (or, briefly, Acts and Forbearances) are the *objects* of duties. Changing the expression, the ends or purposes for which duties are imposed are these: that the parties obliged may do or perform *acts*, or may forbear or abstain from *acts*. The acts or forbearances then to which the obliged are bound, I style the objects of duties.

"2ndly.—The objects of *relative duties*, or of duties which answer to rights, may also be styled the *objects* of the rights in which those duties are implied. In other words, all rights reside in persons, and are rights to acts or forbearances on the part of *other* persons. Considered as corresponding to duties, or as being rights to *acts* or *forbearances*, rights may be said to avail *against* persons. Or changing the expression, they are capable of being enforced judicially *against* the persons who are bound to those acts or forbearances. The acts or forbearances then, to which these persons are bound, may be called the objects not

only of the duties themselves but of the rights corresponding to those duties.

"3rdly.—Of rights *some* are rights *over* things or persons, or *in* or *to* things or persons, or in or to things or persons. Others are *not* rights over things or persons, or in or to things or persons. All rights over things or persons, are of that class of rights which avail against persons generally, or (in other words) which avail against the world at large.

" Of rights which are *not* rights over things or persons *some* are of the class of rights which avail against persons generally. *Others* avail exclusively against persons certain or determinate, or a gainst persons who are determined individually.

"Where a right is a right over a thing, or (changing the shape of the expression) *in* or *to* a thing, I style the thing over which it exists the *subject* or matter of the right. I thus distinguish it from acts and forbearances, considered as the *objects* of rights.

" Where a right is a right over a person, I also style the person, over whom it exists the *subject* of the right. For a person, considered from this aspect, is placed in a position resembling the position of a *thing* which is the subject or matter of a right. Considered from this aspect, he is not considered as invested with rights, nor is he considered as lying under duties or obligations. He is considered as the subject of a right which resides in *another* person, and which answers to duties or obligations incumbent upon *third* persons.

" For example, the relation of master and servant implies two rights which are utterly distinct and disparate. The master has a right, which avails against the servant specially, to acts and forbearances on the part of the servant himself. The master has also a right *over* or in the servant, which avails against other persons generally, or against the world at large. With respect to the first of these rights, the servant lies under obligations answering to the right of the master. But with

respect to the second of these rights, he is placed in a position resembling the position of a *thing* which is the subject or matter of a right. With respect to *that* right, he lies under no obligations. He is merely the subject of a right which resides in his master, and which avails (*not* against himself) but against *third* persons.

To resume:

"All rights reside in persons, and are rights to acts or forbearances on the part of other persons and acts and forbearances considered from this aspect, I would style the *objects* of rights, and of the corresponding duties or obligations. But *some* rights are rights over persons or things. Or (changing the shape of the expression) they are rights in or to persons or things. And persons and things, considered from this aspects I would style the *subjects* of those rights of the and duties which answer to those rights.—*Austin. Lec. XIV, pp.* 378-79. *4th ed.*

When I speak of the subject of a right I mean not the person in whom the right resides, but the thing (strictly so called) or the person, over, in or to which the person entitled has the right: Supposing (I mean) that the right be one of the rights which are rights to things or persons. For an *obligatio*, or *jus in personam*, is not a right *to* a thing or person, but to acts or forbearances *from* a person: and even many of the rights which avail against the world at large are not rights to persons, or things, but merely rights to forberances from persons generally."—*Austin on Jurisprudence: Lec.* 736 *XLII. p. 4th ed.*

Acts and forbearances in the above passages have been called the "objects not only of the duties themselves but of the rights corresponding to these duties." The term object when importing acts or forbearances has unhappily been employed in three senses :—

I.—The *Subject matter of Duty*;

II.—The *end* for the attainment of which duties are imposed : and,

III.—The *object of right* as distinguished from the subject matter of the right an expression which means a thing or a person over which a right is exercised.

It would appear from the meanings which have been assigned to the term 'object' that none of them corresponds to the *Object of Right.*

The expression the 'subject matter of right' seems to denote a corporeal *Object of Right* ; but there is no expression corresponding to the incorporeal *Object of Right.*

Dr. Markby in his Elements of Law, presumably following Austin, says :—

" Rights generally exist in respect of some specific person or thing which is called the object of the right. For example the right of the purchaser of a house to have the house delivered to him by the vendor, or the right of a master to the labour of his hired servant. But there are some rights which have no determinate object, as, for example, the right of a man to his good name. Rights which have no determinate object are rights to forbearances merely."—*Sec.* 160, page *3rd Edition.*

No doubt such rights like the rest are rights to forbearances merely ; but those forbearances have reference to the *Object of Right* towards which such forbearances are to be shown, Hence, those *rights* like the rest of *rights* are *rights to forbearances* from interfering with the *Object* of *Right*, and they are not

rights to forbearances which have no reference to the *Object of Right*.

95. In order to elucidate the truth set forth in section 93, we take the liberty to state that a *right in personam* arising out of a contract for personal service, analytically speaking, consists of the following four elements:—

(1) The *Subject of Right*, namely, the promisee:

(2) The *Object* of *Right*, namely, the personal service of the promisor to which the promisee is entitled:

(3) The *Person bound*: and

(4) The *Abstinence* to be shown by the *Person bound* towards the personal service of the promisor.

The first element may be a *Natural* or a *Juristic Person*. When it is a *Juristic Person*, a concept, for the sake of legal convenience, is the *Subject of Right*; but the fact that such a *Subject of Right* has no *corpus* can not amount to a disappearance of the *Subject of Right* itself; because in the absence of the holder of a *Right* the existence of *Right* cannot be imagined.

The second element, *i. e.* the act promised by the promisor, to be done, for the benefit of the promisee is intangible if acts are deemed to be such. If the act promised is such as depends upon the personal qualifications of the promisor, he is the only Individual who must do it, but if the act needs no personal

qualifications, any one may be delegated to do it. No doubt the act has no such *corpus* as a house, or any other tangible *Object of Right*; but, all the same, it has, as good an existence, in the eye of the law, as any *tangible Object of Right.*

In cases in which the holder of a Right is a *Juristic Person* no jurist, so far as we are aware, has held that because a *corpus* is wanting, the *Subject* of *Right* itself is wanting. The absence of *corpus* in the case of the *Subject of Right* is not tantamount to the extinction of the *Subject* of *Right.* The analogical inference therefore is that the absence of *corpus* in the case of the *Object of Right,* should not be deemed to amount to a disappearance of the *Object.* Moreover, if we accept the position that in the case of *rights in personam* the *Object of Right* has no existence, we are driven to the position that a Right, as a *relation*, can exist in the absence of one of its component elements.

To say the least, *Right* is, thus, either identified with the *Subject of Right,* the existence of which is sufficient to constitute *Right* or it is no longer a *relation* between the *Subject* of *Right* and the *Object* of *Right*, for, the latter has no existence. We need hardly remind the reader that neither of the positions is tenable.

The third element is the *Person bound.* Every one, including the promisor, save the promisee, who is the person entitled,

is the *Person bound* to *abstain* from interfering with the act being done. The promisor, besides having the capacity of the *Person bound* has another capacity. He is a *Debitor ex contractu*, too. In his capacity, as a *Person bound*, he is, analytically, as distinct from the *Debitor ex contractu* as any other *Person bound* is from him (*Debitor*). Where a promisor can delegate any other Individual to do the act agreed upon, that Individual in addition to his occupying the capacity of a *Person bound*, assumes the capacity of a *Debitor ex contractu*. It, however, cannot be said that by becoming a *Debitor ex contractu* he has ceased to be a *Person bound*. If a *Person bound* can, while retaining that capacity, become a *Debitor ex contractu*, there is no reason why a *Debitor ex contractu*, cannot at the same time be a *Person bound*. Strictly speaking, the delegate is only an agent of the *Debitor ex contractu*, but such a discussion is immaterial for our present purpose.

The fourth element is the *Abstinence* which every *Person bound* including the promisor, has to show towards the *Object of Right*.

The fourth and the second elements are distinct from each other. The former, as we have explained in Section 75 is the passive phase of the conduct of the *Person bound*, be he the *promisor* or any one else, while the latter, as has been

explained in Section 82, is the active phase of the conduct of the *promisor* or of his delegate. When the *promisor* is engaged in doing the act, he combines in himself both the capacities of the *Spring of the Object of Right* and of the *Person bound*. Under the terms of the contract the act to be performed, which originally formed part of the *Limited Freedom* of the *promisor*, is, as has been shown above, taken away from such *Freedom*, and annexed to the *Limited Freedom* of the promisee (S. 46).

Viewed in the light of the facts just stated the personal service of the promisor cannot possibly be regarded as the *Subject matter of Duty* imposed upon the *promisor*. His duty, in respect of that act, is to regard it as within the control of the promisee, and to *abstain* from interfering with the performance of it, just as he must *abstain* from damaging a book which he may have sold to the *promisee*.

The physical union of the *Spring of the Object of Right* and the *Person bound*, and the practical identity of the result of *performance* and *Abstinence from interference therewith*, must not make us lose sight of the analytical distinction between the *Debitor ex contractu* who during the performance is the *Spring of the Object of Right* and the *Person bound*, and between the *Object of Right* and the *Subject matter of Duty*.

96. There is another difficulty concerning the analysis of *Right* into four elements. *Duty* is a correlative of *Right*, and if *Right* were resolvable into four elements, analogical reasoning would render *Duty* resolvable into four elements. They would be :—

(1) The *Person bound :*

(2) The *Abstinence :*

(3) The *Object of Right* with reference to which the *Abstinence* is to be shown ; and,

(4) The *Subject of Right.*

If such an analysis were correct, *Duty* would be another name for *Right*, while in fact it is a correlative of *Right* and, as such, a complement thereof. The difficulty, which has been suggested by us, might be got over by rejecting the analysis of *Duty* into four elements, and by substituting the analysis of it into the following two elements, *viz :*—

(1) The *Person bound.*

(2) The *Abstinence.*

The result of the above substitution, however, would be that *Duty* would be a simpler conception than *Right ;* for it would consist of two elements out of the four which constitute *Right.*

CHAPTER XI.

CRITICISM OF THE CLASSIFICATION OF RIGHTS INTO RIGHTS IN REM AND RIGHTS IN PERSONAM.

97. *Rights* have been divided into *rights in rem* and *rights in personam*, on the basis of the *unlimited* or *limited* extent of the *Person bound.* In addition to the passages quoted in section 54 the following passage regarding the classification alluded to, occurs in the Elements of Jurisprudence by Dr. Holland :—

"Another grand division of rights turns upon the limited or unlimited extent of the person of incidence, by which phrase, as may be remembered, we mean the person against whom the right is available. A right is available either against a definite person or persons, or against all persons indefinitely. A servant, for instance, has a right to his wages for the work he has done available against a definite individual, his master; while the owner of a garden has a right to its exclusive enjoyment available against no one individual more than another, but against everybody.

"This distinction between rights has been expressed by calling a right of the definite kind a right *in personam*, of the indefinite kind a right *in rem*. And these terms, though not perfectly satisfactory, have obtained a currency. which is of itself a recommendation, and moreover are perhaps as good as any substitutes which could be suggested for them. The former term indicates with tolerable perspicuity a right available 'in personam (certam)' against a definite individual, while the latter implies that the right is capable of exercise over its object 'in rem' without reference to any one person more than another.

"The use of the terms to distinguish between two classes of rights is of comparatively recent date, but is quite in harmony with their use by the classical Roman Jurists, in distinguishing between different classes of stipulations, pacts, actions, exceptions and edicts. Any of these are said to be

'in personam' if referring to the duties of a given individual, 'in rem' if operating generally".—*Holland, p.* 123, *4th edition*

98. In order to appreciate the real worth of this division the following points are respectfully submitted for careful consideration:—

(*a*) The *Person bound* is not under the analysis of *Right*, which *we* have made, an essential element of *Right*, but a component element of *Duty* as a correlative of *Right* and, therefore, not a proper ingredient to form the basis of the classification of *Rights*. One of the two components into which *Right* is resolvable should be fixed upon, and some characteristic thereof should be made the basis of the classification of *Right*.

(*b*) Assuming for the sake of argument that *Right* is resolvable into four elements, and that the *Person bound* is one of those elements, the classification is fallacious; because the basis of classification is not common to both kinds of *Right* Some *Rights* under the classification, in question, are *in rem*, because of the *unlimited extent* of the *Person bound*; and the rest of the *Rights* are *in personam*, because of the *limited extent* of the *Debitor ex contractu* who has been mistaken for the *Person bound*, irrespective of the fact that the *Debitor ex contractu*, and the *person bound* are not convertible expressions and import distinct juristic capacities. The *Person bound*, as we have shown (s. 63) is one

of the Individuals who, have to *abstain*, and to be passive ; and the *Debitor ex contractu* is the Individual who, as such, has to do a definite act for the benefit of the *Subject of Right*. Indeed the two capacities, as has been shown, (s. 77) may be, physically, united in one and the same Individual, but that is no reason why their analytical distinction should be ignored. It is in consequence of ignoring the analytical distinction just referred to that the classification in question is made. A careful observation of the juristic distinction, we have pointed out, would, however, show that to say that some *Rights* are *in rem*, because the extent of the *Person bound* towards those *Rights* is unlimited, and that other *Rights* are *in personam* ; because the *Debitor ex contractu* in those *Rights* is limited, is no classification at all.

(c) The proposition that the *Person bound* is limited in *extent* in any kind of *Right* is a fallacy. In the case of a *right in rem* the unlimited *extent* of the *Person bound* is conceded on all hands, and a close examination of *rights in personam* shows that the *Person bound* towards them is also unlimited in *extent*. When B agrees to do a definite act for the benefit of A, B is not the only *Person bound*, be his *Duty* to *abstain* from interfering with the doing of the act agreed upon, as we have ventured to think, or be his duty to do the definite act as is the current view. Every Individual besides B is also the *Person*

bound towards the *Right* acquired by the promisee A, and the duty of every Individual besides B, therefore, is to *abstain* from interfering with the doing of the act by B. Such is the only correct deduction from the proposition that a validly formed contract confers a *Right* upon the promisee. If we were to hold that the promisor B is the only *Person bound*, and that every other Individual is not the *Person bound*, and can, therefore, with impunity, prevent the promisor B, from doing the act promised by him, an absurd conclusion would be the result. We would be driven to accept the position that there are certain *Rights* the duty correlative to which is imposed upon *one* Individual only, and that the whole world, with the exception of that *one* Individual, is subject to no duty correlative to those *Rights*. Any one with the exception of one Individual may, therefore, interfere with the doing of the act by the promisor, without giving a cause of action to the promisee, and without incurring any liability. The above position is fallacious and no body, in our humble judgment, would suggest it.

Independently of the absurdity which would result from holding that a contract imposes a *duty* to *do* upon the promisor alone, and that the whole world, with the exception of the promisor is subject to no duty correlative to the right of the promisee in the acts to be done by the promisor, we find Austin and Dr. Holland stat-

ing in express terms that in the case of a *right ex contractu* persons generally are subject to a negative *duty* correlative to the *right* of the promisee in the definite act to be done by the promisor for the benefit of the holder of that *right*.

"Besides the right of the heir over or in the heritage (which is deemed by every Civilian a real right), there are numerous real rights which are not rights over things: being rights over persons; or being rights to forbearances merely and having no subjects (persons or things).

"Of rights existing over persons and availing against other persons generally, I may cite the following as examples:—

"The right of the father to the custody and education of the child: the right of the guardian to the custody and education of the ward: the right of the master to the services of the slave or servant.

"Against the child or ward, and against the slave or servant, these rights are rights *in personam*: that is to say, they are rights answering to *obligations* (in the sense of the Roman Lawyers) which are incumbent *exclusively* upon those determinate individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him as for a breach of the contract of hiring or as for breach of an obligation (*quasi ex contractu*) implied in the status of servant.

"But considered from another aspect, these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally*, or against the world at large; and the duties to which they correspond, are invariably negative. As against other persons

generally they are not so much rights to the custody and education of the child, to the custody and education of the ward, and to the services of the slave or servant, as rights to the *exercise* of such rights *without molestation by strangers* As against strangers, their substance consists of duties incumbent upon strangers, to *forbear* or *abstain* from acts inconsistent with their scope or purpose.

"In case the child (or ward) be detained from the father (or guardian), the latter can *recover* him from the stranger. In case the child be beaten, or otherwise harmed injuriously, the father has an action against the wrong-doer for the wrong against his *interest* in the child. In case the slave be detained from his master's service, the master can recover him *in specie* (or his value in the shape of damages) from the stranger who wrongfully detains him. In case the slave be harmed and rendered unfit for his work, the master is entitled to satisfaction for the injury to his right of ownership If the servant be seduced from his service, the master can sue the servant for the breach of the contract of hiring; and *also* the instigator of the desertion, for the wrong to his *interest* in the servant. In case the servant be harmed, and disabled from rendering his service, the harm is an injury to the master's *interest* in the servant, as well as to the person of the latter. The correlating conditions or *status* of husband and wife, will also illustrate the nature of the capital distinction, which I am endeavouring to explain and exemplify.

"Between themselves, each has *personal* rights availing against the other, and each is subject to correspond ⁊ g *obligations* (in the sense of the Roman Lawyers). Moreover, each has a right in the other, availing against the rest of the world, or answering to duties attaching upon persons generally. Adultery *by* the wife violates a right of the former class, and entitles the husband (against the *wife*) to an absolute or qualified divorce. Adultery *with* the wife violates a right of the latter class, and gives him an action for damages against the adulterer.

"And here I may remark conveniently, that where a *real* right is *over* a person, or where a *personal* right is a right to a person, the person is neither invested with the right, nor is he bound by the duty to which the right corresponds: the right *residing* in a person or persons distinct from himself, and *availing* against a person or persons also distinct from himself. He therefore is merely the *subject* of the real or personal right, and occupies a position *analogous* to that of a *thing* which is the subject of a similar right. Consequently, whatever be the kind or sort of the real or personal right, he might be styled *analogically*, (when considered as its subject,) *a thing*.

"For example, independently of his rights against the child, the parent has a right *in* the child availing against the world at large. And, considered as the subject of this last mentioned right, the child is placed in a position analogous to that of a *thing*, and might be styled (in respect of that analogy) a *thing*.

"Independently of his rights against the present, and independently of his obligations towards the parent the child has a right *in* the parent availing against the world at large. The murder of the parent by a third person might not only be treated as a *crime*, or *public wrong*, but might also be treated as a *civil* injury against that right in the parent which belongs to the child. By the laws of modern Europe, the civil injury merges in the crime; but in other ages the case was different; the offender lay under a two-fold obligation: to suffer punishment on the part of the society or community and to satisfy the parties whose interest in the deceased he had destroyed. Before the abolition of Appeals in criminal cases, this was nearly the case in the law of England. The murder was obnoxious to *punishment* to be inflicted on the part of the State, and the wife and the heir of the slain were entitled to vindictive *satisfaction*, which they exacted or remitted at their pleasure. And this is the distinction, and the only one which exists between a civil injury and a crime.

"Now considered as the subject of the real right which resides in the child, the parent is placed in a position *analogous* to that of a *thing*, and might be

styled (in respect of that analogy) a *thing*. In short whoever is the subject of a right which resides in *another* person and which *avails* or *obtains* against a *third* person or persons is placed in a position *analogous* to that of a *thing*, and might be styled (in respect of that analogy, a *thing*, —*Austin, Jurisprudence, Lect. XV, pp.* 396-98, *4th ed.*

Dr. Holland in his Elements of Jurisprudence says :—

"Certain rights arising out of contract strikingly resemble the two classes of family rights last considered. They must be mentioned in this place in so far as they are available against all the world, and are therefore capable of being violated by third parties; although the mode in which such rights are acquired and lost, and their effect as between the contractors themselves, can be explained only at a later stage of our inquiry,

A master has a right, as against the world to the services of his servant, and can sue not only any one by whose act he is rendered less capable of performing his duties, but also any one who entices him away from the performance of them[1] : and this principle has been declared to apply not only to demestic service, but also to any kind of employment. In a modern English case, when a celebrated singer had agreed with the manager of an opera to sing for him during a definite period, and for no one else, but had been persuaded by the manager of another opera to break her contract, it was held that the first manager had a right of action against the second. The claim was resisted on the ground that the employment was not of such a nature as to warrant the application of the exceptional remedy given against any one who wrongfully and maliciously, *i. e.* with notice, entices a servant away from his master, indeed that this remedy was itself an anomalous relic of the times of serfdom. But the majority of the Court adopted the view expressed by Mr. Justice Crompton, who said;—The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to

[1] The seduction of a maid-servant may give a right of action to her master. Fores *v.* Wilson, Peake, 55.

services or engagements under contracts for services of any particular description." [1]—*Holland p.* 152, *4th edition.*

On taking into consideration the absurdity of the proposition that the duty correlative to a *right ex contractu* is imposed upon *one* Individual only, and that the whole world, with the exception of that Individual, is subject to no duty correlative to that Right; and bearing in mind the express statements contained in the above passages one might say :—

That the assertion concerning a *right ex contractu*, is not that a duty correlative thereto is imposed upon one Individual only, and that the whole world, with the exception of that Individual, is subject to no duty correlative to a *right ex contractu.*

The assertion concerning a *right ex contractu*, on the contrary, is that a positive duty to *do* is imposed upon one Individual, the promisee, and that the whole world with the exception of the promisor, is under a negative duty to *abstain* from interfering with the act which the promisor has to do. One might, in other words, say that a contract creates a *right in personam* and a *right in rem.* The Right against the promisor is a *right in personam* and the

[1] Lumley *v.* Gye, 2 E and B. 216, *diss.* Coleridge J. The principle was affirmed by the Court of Appeal in Bowen *v.* Hall, L. R. 6 Q. B. Div. 333, *diss.* Lord Coleridge, C.J.

Right against the whole world, with the exception of the promisor, is a *right in rem.*

The above suggestion, no doubt, could save those who adopt it from the absurd proposition just alluded to; but at the same time it would deal a death blow, at the distinction between *rights in rem* and *rights in personam*; for it is conceded on all hands that the phrase *in rem* denotes the *compass*, and not the subject of right. "It denotes that the right in question avails against persons generally; and *not* that the right in question is a right over a *thing.* (*Austin, p.* 380, *Vol. I, 4th ed.*

It is also conceded on all hands that the phrase *in personam* like the phrase *in rem*, denotes the *compass* of the right. It denotes that the right avails *exclusively* against a *determinate* person or against determinate persons.—*Austin, p.* 380, *Vol. I, 5th ed.*

The above passages place it beyond doubt that the *compass* of the Individuals, who are bound, is the criterion of distinction between a *right in rem* and a *right in personam*, and that the *Object of Right* has nothing to do with the classification of Rights into *rights in rem* and *rights in personam.*

If, however, the *compass* of the Individuals is the *criterion* of the distinction between the two kinds of *Right* and if the

Object of *Right* has nothing to do with that classification, we may safely say the nature of the duty imposed upon any Individual has also nothing to do with the classification of Rights into *rights in rem* and *rights in personam*. Admitting that the *compass* of the Individuals, who are bound, is the distinctive feature, and that the nature of their duty is immaterial, it follows, as a matter of logical inference, that a Right created by a contract in favour of a promisee is a *right in rem* inasmuch as a correlative duty is imposed *not* upon the promisor only but upon the whole world.

The substance of what has been said is that *acquisition* on the one hand, creates in favour of the acquirer of the property a right which is called by English writers upon Jurisprudence a *right in rem* whereby a *negative duty* to *abstain* is imposed upon the whole world. *Contract*, on the other hand, creates in favour of the promisee a right which is called by English writers upon Jurisprudence a *right in person* whereby a *positive* duty to *do* is imposed upon one Individual and a negative duty to *abstain* is imposed upon the whole world, with the exception of the promisor.

Viewed in the light of what has just been said the phrases '*in rem*' and '*in personam*' which are intended to

denote the *unlimited* or *limited* extent of the Individuals who are subject to duty fail to serve that purpose. They only serve to denote the *nature of the duty imposed in each case*

The *extent* of the *Person bound* is unlimited; because each Individual of that class has to show a *passive Abstinence* towards the *Object* of *Right* which may be shown, simultaneously, by all such Individuals; and there is nothing, in the nature of their *duty* to make them determinate. Even when the Individuals comprised within the '*Person bound*' are contemplated as *Infringers* they are taken to be the potential *Infringers* and not the actual *Infringers*. The reason why they are taken to be the potential Infringers is that an actual Infringement cannot be committed by an indeterminate Individual and as soon as an Individual commits Infringement the very act of his makes him determinate, not only in a *right in personam*, but even in the case of a *right in rem*.

(*d*) The only Individuals connected with *Rights* which can be and must be limited in extent are:—

i.—The *Subject* of *Right*.

ii.—The *Debitor ex contractu*, and

iii.—The *Infringer*.

The *Subject of Right* is always determinate in both kinds of *Right*; because a *Right* cannot, possibly, belong to *Persons* unlimited and indeterminate in extent. The *Debitor ex contractu* by the very act of agreement, into which he enters, becomes a determinate person, for no indeterminate person can enter into an agreement. The *Debitor ex delicto*, in a like manner, must, in the nature of things themselves, be a determinate person. The very act of *Infringement*, by the wrong-doer, makes him determinate.

In the case of *rights in rem* there is no *Debitor ex contractu*. Similarly, there is no *Debitor ex delicto* so long as no member of the class termed the '*Person bound*' has infringed the *right in rem*. In the case of *antecedent rights in personam* there is the *Debitor ex contractu* who is a determinate person, and in the case of *remedial rights in personam* there is the *Debitor ex delicto* who is determinate. The wrong-doer becomes determinate when actual *Infringement* by him is committed, but if a potential *Infringement* is thought of, any one of the class termed '*the Person bound*' may be deemed a *Debitor ex delicto in posse*.

(*e*) The promisor with reference to the promisee may fill four different capacities, three of which, as we have shown (S. 68) are juristic and the remaining one is physical. So far

as the *future* doing of the act promised by him is concerned, he is the *Debitor ex contractu*; so far as the *Abstinence* from interfering with the doing of that act is contemplated, he is one of the *Persons bound*; so far as the *Infringement in esse* is contemplated, he is the Debitor *ex delicto* (the wrong-doer) and so far as he is contemplated to be actually engaged in performing the act, he is the *Spring of the Object of Right.*

As a *Debitor ex contractu*, he, as has been shown above (S. 63) is always a determinate person. As a *Person bound in posse*, he is one of the class which is unlimited in extent. As a *Debitor ex delicto*, he, again, is determinate. When he is a *Debitor ex delicto* he is not simply a *Person bound*, but a *Person bound plus an Infringer.* For a *Person bound* is a wrong-doer *in posse*, while the *Debitor ex delicto* is a wrong-doer *in esse.*

(*f*). We have not made the Roman Law our speciality, nor are we in a position to do so; but being firm believers in Evolution we cannot help thinking that the juristic generalisations and classifications must have come into existence long after the details of the Roman Law, and that the individual rules of that law must have been made long before such generalisations and classifications, in order to meet the practical exigencies of the society, irrespective of such juristic generalisations and classifications.

For example, the classifioations of *Rights* into *rights in rem*, and *rights in personam*, and the corresponding division of *Duties* into negative and positive must have come into existence long after the rule of the Roman Law that the *promisor* binds himself personally and does not bind the property concerning which he enters into a contract.

If lines of conduct fixed in the shape of moral or legal rules are lines of the least resistance due to the co-operation of physical and social factors, we venture to think that the rule of the Roman Law just alluded to, owes its origin to that stage of the Roman Society in which the family property belonged to the *group* called family and not to each individual member of the group exclusively. It was a natural consequence of such a family institution that if any member of a family should enter into a contract, he would be bound personally and that no portion of the family property which did not exclusively belong to the contracting member but formed the subject matter of the contract, would not be affected by the contract. We may be wrong in our conjecture concerning the origin of the rule as to the *personal* liability of the promisor; but the rule must have existed in the Roman Law long before the classification of *Rights*.

If the classification of *Rights* into *rights in rem* and *rights in personam* was made by such writers upon Jurisprudence as were familar with the rule of the Roman Law concerning the personal liability of the promisor, we feel little hesitation in presuming that the said rule must have influenced the classification and must have furnished a basis to such a classification. If the presumption is correct, it is a technical rule of the Roman law and no inherent quality or essential element of Right that furnishes a *basis* of the classification of Right. Such being the case, the classification must stand or fall with the technical rule. If the law were altered and if it were ruled that the property which forms the subject matter of a contract becomes the property of the promisee as soon as the contract is formed and the relation of the whole world including the promisor towards that property is the same as towards any other property of the promisee, the classification would vanish.

The classifications and generalisations of Jurisprudence as a science, we venture to think, must be derived from and based upon the Laws of Nature governing the voluntary acts performed for the preservation of life in a *Physico-social Environment*; and such classifications and generalisations must be regulated by the principles of Logic and not by

the erroneous notions or artificial rules which may have found their way into the systems of Law. Jurisprudence. in our humble judgment cannot possibly be raised to the dignity of a Science so long as it consists of the definitions of certain conceptions which are indispensable for the framing of rules of conduct, and of the arrangement of the *corpus juri* in various departments, and of the classifications of Rights and of correlative Duties. Jurisprudence, in order to be a Science, must be regarded as a particular department of Ethics dealing with such social relations only as are brought about by Co-operation and must, like Ethics, *be based upon* the *necessary* connection between our voluntary acts and life, both individual and collective.

99. Bearing in mind the points set forth in S. 98, it is clear that the division of Rights into *rights in rem* and *rights in personam*, on the basis of the unlimited or limited extent of the *Person bound*, is unsound, and would seem to be the result of a confusion of ideas. In the case of *rights in rem* all the Individuals who have to *abstain* from infringing the full enjoyment of the *Object of Right* by the *Subject of Right* and who might be contemplated as potential wrong-doers are correctly spoken of as belonging to the class 'the *Person bound*,' and are rightly held to be unlimited in extent. In the case of rights *in personam*, instead of contem-

plating the *Person bound*, who as has been shown (S. 98 *c.*) is as unlimited in the one case as in the other, the promisor, as the *Debitor ex contractu*, is contemplated, and held to be determinate. No doubt the promisor, as the *Debitor ex contractu* is determinate and limited in extent, but, as such, he is very different from the *promisor* as one of the *Persons bound*. In the former capacity he is the only Individual who has to do an act, for the benefit of the promisee, and in the latter capacity he is one of the unlimited class termed the *Person bound* who has to *abstain*. The physical union of the two capacities, in the person of the promisor, however, led the jurist who drew the distinction between the two classes of Rights to imagine that, as the *promisor* in his capacity of the *Debitor ex contractu* is a determinate person, that promisor, in his capacity of the *Person bound*, is also determinate and not a *unit* of the class denominated 'the *Person bound*' which is unlimited in extent.

The process which seems to have led to the division of Rights into *rights in rem* and *rights in personam* is that some jurist mixed up the *Object of Right* with the *Subject matter of Duty*, wherefrom resulted the confusion between the *Debitor ex contractu* (who assumes the function of the *Spring of the Object of Right*) and the *Person bound*. Both of them were

imagined to be convertible expressions, and the promisor who combines those two distinct capacities was made the basis of the classification.

CHAPTER XII.

A BASIS OF CLASSIFICATION OF RIGHTS *INTO RIGHTS IN REM AND RIGHTS IN PERSONAM* SUGGESTED.

100. The reasons set forth above (S. 98) render it evident that the limited or unlimited *extent* of the *Person bound* cannot serve as a criterion of distinction between *rights in rem* and *rights in personam.*

Such being the case, two alternatives are open to us regarding the above classification of *Rights*:—

I.—We may either reject that classification and along with it the phrases '*in rem*,' and *in personam*: or,

II.—We may retain that classification and those two phrases, finding some other foundation on which the said classification may be based.

As the classification is a time-honoured classification, and as each of the two classes, exactly, denotes a definite *group* of Rights which is distinct from the other, we venture to think that the classification and the phrases should be retained, but that some satisfactory basis on which that classification is to be based should be found.

Before proceeding with discussing the basis of the classification alluded to in S. 100, certain introductory observations would seem to be indispensable.

When an Individual has a definite exclusive control over a tangible thing that Individual is deemed to be in *possession* of that thing.

When intangible things are in the exclusive control of an Individual that Individual may be deemed to have a *quasi-possession* of such thing. The doctrine of possession, says Dr. Holland, "has been extended under the name of 'quasi possession' to control which may be exercised over advantages, short of ownership, which may be derived from objects.—Holland, p. 167, 4th ed.

Dr. Markby in his Elements of Law speaking of 'quasi 'possession' of incorporeal things says :—

"The possession, as we have hitherto explained it, clearly assumes some tangible existing thing, over which the party in possession may exercise his physical control; but the Roman Lawyers extended the idea of possession to abstractions; to things which are not perceptible to the senses; to incorporeal things, as they are usually called by lawyers, (Sec. 391 3rd ed.)

The following passage is to be found in the Essay on Possession and Right by Sir F. Pollock :—

"The term 'possession' is even applied to the exercise and enjoyment of customary rights: in this sense, Coke says that 'Possession must

have three qualities; it must be long, continual, and peaceable,' and speaks of acts adverse to the right claimed as 'an interruption of the possession."—P. 36, ed. of 1888.

When a thing whether tangible or intangible is out of the exclusive control of an Individual which the nature of that thing admits of, such a thing is deemed to be *out* of the *possession* or *quasi possession* of that Individual.

An interference with the full enjoyment of a tangible or intangible thing which forms the *Object of Right* of an Individual, by that Individual may, to the extent of such interference, be regarded for the purposes of the classification we are discussing, as dispossession by the Infringer. For the *Subject of Right*, who is not in a position to enjoy his *Object of Right* fully, has, to the extent of his *inability*, lost the exclusive control of the thing forming the *Object of Right*; and the loss of the exclusive control is tantamount to the loss of *possession* or *quasi possession*.

If we accept the position that an interference with the full enjoyment of the *Object of Right* whether tangible or intangible, by an Individual, amounts to *dispossession* of that Individual from such *Object of Right*, we may classify the cases of such dispossession into:—

I.—Cases in which the *Object of Right* not being in (what is deemed to be) the *possession* or *quasi*

possession of the *Subject of Right*, is not allowed to proceed to his *possession* or *quasi possession by Infringement*; and

II.—Cases in which the *Object of Right* having come to (what is deemed to be) the *possession* or *quasi possession* of the *Subject of Right* is either taken out of such *possession* or *quasi possession*, or has been interfered with, whilst it remains in the possession of the owner.

Having premised, so far, we would respectfully submit that the real distinction between *rights in rem* and *rights in personam turns upon the possession* or *non-possession* of the *Object of Right* by the *Subject of Right.*

When the Object of Right, whether tangible or intangible, is in the possession or quasi possession of the Subject of Right, the juristic relation between the Object and the Subject, arising out of such a state of things, is a right in rem.

When the Object of Right, whether tangible or intangible, is not in the possession or quasi possession of the Subject of Right, the juristic relation between the Object and the Subject, arising out of such a state of things, is a right in personam.

The *dispossession* of the *Subject of Right* from the *Object of Right* may either belong to the first class of dispossession or to the second class thereof.

When, on the one hand, a *right in personam* is a *right antecedent* to the *possession* or *quasi possession* of the *Thing* by the *Person*, the Right is a right *antecedent* to *possession* and will correspond with a *right in personam* arising out of a contract.

When, on the other hand, a *right in personam* is a *right consequent* on *dispossession* it will correspond with a *right in personam* arising out of a delict.

101. As the subject under discussion is somewhat difficult, we may take the liberty to repeat it in another form. Where the *Object of Right*, whether tangible or intangible, is in the *possession* or *quasi possession* of the *Subject of Right*, the Right is a *right in rem*, and where the *Object of Right* is not in the *possession* or *quasi possession* of the *Subject of Right*, the *Right* is *a right in personam*. Of course that class of *Rights* in which the *Object* of *Right* is not in the *possession* or *quasi possession* of the *Subject* of *Right*, will have to be subdivided into *rights antecedent to possession* and *rights consequent on dispossession*, the former corresponding to *rights ex contractu*, and the latter to *rights ex delicto*. The *dispossess-*

sion will also have to be be so defined as to include *Infringement*, in as much as any interference with the full enjoyment of the *Object* of *Right* is, as it were, a *dispossession* of the *Subject* of *Right* from the *Object* of *Right* to the extent of the *Infringement*.

A concrete example would perhaps make our meaning clear. Where A agrees to purchase a house from B, the juristic *relation* between A and the house is in its first stage, wherein A is entitled to certain acts, on the part of B, which are necessary for the purpose of putting A into the possession of the house. A is also entitled to an *Abstinence*, on the part of all the world including B, from interfering with the delivery of the house by B to A.

When the executory stage of the contract is passed without any *breach*, and when in pursuance of the contract the *possession* of the house is taken by A, the second stage of his juristic *relation* with the house is reached. A, in this stage, is entitled to an *Abstinence*, on the part of all the world, in order to let him enjoy the house.

Now we may imagine that an Individual interferes with the full enjoyment of the house by A. No sooner the *Infringement* takes place than the third stage of the juristic *relation* between the *Person* and the *Thing*, namely A and the

house is reached, and a *right in personam consequent* on *dispossession* is created in favour of A against the *Infringer*.

The *rights prior to possession* in the above illustration are *rights ex contractu*, so far as the *Debitor ex contractu* B is concerned, and they are *rights in rem* so far as Individuals other than B are concerned. The *rights after the possession* of the house has been taken by A are the *rights in rem*. The *rights consequent on dispossession* of A from the house by the *Infringer* are *rights ex delicto*.

Viewed in this light, *rights ex contractu*, *rights in rem* and *rights ex delicto* are the three stages, of the juristic *relation* between the *Person* and the *Thing* in order of time. Out of the three stages, the *second* is more directly connected with the preservation of life, both individual and collective, in a *Physico-social Environment*. As the preservation of life, both individual and collective, in a *Physico-social Environment* is the *ultimate end* of Law, and as the protection of the *second stage* of the juristic *relation* between a *Person* and a *Thing* is not enough for the preservation of such life, the Law, as a matter of necessity extends its protection both to the *first stage* as well as to the *third stage*. The Law protects those three stages in order :—

i.—To allow a free passage of the property transferred, from the transferer to the transferee :

ii.—To secure a quiet enjoyment of the property transferred whilst it is in the *possession* of the transferee : and

iii.—To prevent that property from being taken away from the transferee or being interfered with while in his *possession*.

In other words, the rule, 'Every Individual has a *Right* to what belongs to him,' has been supplemented by two subsidiary rules. They are :—

(1) Every Individual has a Right to obtain what he is entitled to under a contract.

(2) Every one has a remedial advantage when any of his Rights is infringed.

CHAPTER XIII.

SUMMARY.

102. The following propositions will serve as a *résumé* of the important points discussed in the preceding pages :—

I.—One of the fundamental Laws, which govern the world, is the Transformation and Equivalence of Force, under which the results obtained by the exercise of the energy are proportionate to the energy spent. (S. 2—6.)

II.—As an application of the aforesaid Law there is an approximate Equilibrium between the energy spent and the results obtained. (S. 6.)

III.—Life is the adjustment of the internal relations with the external relations. (S. 7—17.)

IV.—The result of the above propositions is that when one Individual is living alone, in a Physical Environment, he, in order to preserve his life, has to adjust his internal relations with the external physical relations ; and in performing the life-sustaining acts his freedom is not limited by Co-operation with other Individuals. (S. 20.)

V.—The approximate balance between the acts of the Individual and the results thereof affects the area of his life. (S. 20.)

VI.—When a number of Individuals perform the life-sustaining acts, in a state of Co-operation, it calls for a further adjustment of the internal with the external relations and the unlimited freedom, becomes limited. (S. 19.)

VII.—The limitation imposed by Co-operation according to intuition (organised experience), and acquired experience, is that every Individual has to perform his life-sustaining acts, without interfering with such acts of others. (S. 20)

VIII.—Life, individual as well as collective, is *necessarily* connected with such a *Limited Freedom.* (S. 3 & 26.)

IX.—The *necessary* connection between such *Limited Freedom* and Life, is the basis of all *Rights* and *Duties*. (S. 19.)

X.—If life, individual as well as collective, in a *Physico-social Environment* is to be preserved, every Co-operating Individual *should* be perfectly free to perform the life-sustaining acts within his *Limited Freedom* and *should be* strictly bound to *abstain* from trespassing upon *Limited Freedoms* * of other than his. In other words, every Individual *should* stand in a definite *relation* to his own *Limited Freedom*, and he *should* stand in another definite *relation* to other *Limited Freedoms*. (S. 23.)

XI.—The *definite relation* which he should have with his own *Limited Freedom* is his *right*. (S. 26.)

XII.—The *definite relation* which he *should* have with other *Limited Freedoms* is his *duty*. (S. 26.)

XIII.—*Right* † may be defined to be a *definite relation between an Individual and his Limited Freedom, essential for the preservation of life, both individual and collective,* in *a Physico-social Environment. Duty* may be defined to be *a*

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* Liberty has been taken to use Freedom in a concrete sense.

† The definitions of Right and Duty given here slightly differ from those given in the body of this work.

definite relation between an Individual and other Limited Freedoms essential for the presservation of life, both individual and collective, in a Physico-social Environment. (S. 29.)

XIV.—Rights may be classified with reference to their source (S. 30) in :—

(*a*) * Natural.

(*b*) * Moral.

(*c*) Legal.

XV.—A Legal Right is a definite *relation* between an Individual and his *Limited Freedom*, viewed from the stand point of the laws of a State. (S. 30.)

XVI.—The State from the stand point of a jurist, simply *recognises* certain *Rights* which have an objective existence; but for political purposes they are deemed to be the *creatures* of the State. (S. 34.)

XVII.—The State has not only to define *Legal Rights* ; but also to specify the modes for the protection thereof. Such modes, however, form no essential element of *Legal Rights* (S. 35).

XVIII.—Analytically speaking, *Right* consists of two elements only (S. 39), *viz* :—

(*a*) The *Subject of Right* : and,

(*b*) The *Object of Right.*

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* For the definition of Natural and Moral Rights see s. 30.

XIX.—The first element may be a *Natural* or a *Juristic Person* (S. 41).

XX.—The second element may be a tangible or an intangible thing (S. 41).

XXI.—When the *Object* of *Right* is intangible, such *Object* has, for the purposes of Jurisprudence, as good an existence as any tangible thing (S. 93).

XXII.—It is not correct to say that there are *rights* in which the *Object of Right* is wanting not in *corpurs*, but in *existence*.

XXIII.—*Duty* like *Right* is a definite *relation* between two elements (S. 47) only, *viz* :—

(*a*) The *Person bound*; and

(*b*) The *Subject matter of Duty*.

XXIV.—The *Subject matter of Duty* is always a passive *Abstinence* (S. 48).

XXV.—When an act is said to be the duty of a person, analytically speaking, it means *Abstinence* from interference with the performance of the act, and does not mean the doing of such act (S. 76).

XXVI.—*Right* and *Duty* are correlative in the following senses only :—

(1) The idea of each of them suggests the idea of the other.

(2) Every *Duty* has a corresponding *Right* (S. 14).

If we compare *Right* with *Duty* we find that the former is an active relation with one's own *Limited Freedom*, and the latter is the passive relation with other *Limited Freedoms* (S. 61).

XXVII.—To define a Legal Right as a *capacity to regulate the actions of others with the assent and assistance of the State* is erroneous (S. 87—89).

XXVIII.—In the first place, the *capacity* stands in need of several limitations (S. 87).

XXIX.—In the second place, the *capacity* with all the limitations, remains only an incident of a *Legal Right* (S. 88).

XXX.—The substitution of a vague description of *Right* for an exact definition of it, namely, to say 'that *Right* is a *capacity* to regulate, &c., &c' accounts for the analysis of *Right* into four elements (S. 91).

XXXI.— The *Person bound* and *Abstinence*, strictly speaking, are not the constituent elements of *Right*; they are component elements of *Duty* (S. 91).

XXXII.—The division of *Rights* into rights *in personam* and rights *in rem* on the basis of the *limited* or *unlimited extent* of the *Person bound* is due to a confusion of the *Person bound* with the *Debitor ex contractu* who becomes the *Spring of the Object of Right* or the *Infringer* (S. 98).

XXXIII.—A close examination of the nature of the two classes of Rights shows that the basis of classification is not common to both (S. 98—*b*).

XXXIV.—What is unlimited in extent in a *right in rem*, is the *Person bound*, and what is limited in extent in a right *in personam*, is the *Debitor ex contractu* who becomes the *Spring of the Object of Right* or the *Infringer* (S. 98*e*—99).

XXXV.—The *possession* or *quasi possession* of the *Object of Right* by the *Subject* of *Right*, would seem to be a proper basis of classification (S. 100).

XXXVI.—When the *Object of Right*, is in the *possession* or *quasi possession* of the *Subject of Right*, the *Right* is a right *in rem* (S. 100).

XXXVII.—When the *Object of Right* is not in the *possession*, or *quasi possession* of the *Subject of Right*, the *Right* is a *right in personam* (S. 100).

103. These pages contain our ideas concerning *Right* and *Duty*. No one can be more conscious of the repetitions and omissions than onrselves. Our sincere desire throughout these pages, has only been a respectful exposition of the various fallacies and errors, from which, the portion of the Jurisprudence discussed in these pages, is not free, in our humble judgment.

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